TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 38.

RAILWAY EXPRESS AGENCY, INCORPORATED,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE
COMMONWEALTH OF VIRGINIA

FILED FEBRUARY 26, 1958
PROBABLE JURISDICTION NOTED APRIL 14, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 29, 1958

[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 4742

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

against

COMMONWEALTH OF VIRGINIA, Appellee.

From the State Corporation Commission.

ORDER AWARDING APPEAL—April 24, 1957

Upon the petition of Railway Express Agency, Incorporated, an appeal of right is awarded it from an order entered by the State Corporation Commission on the 1st day of March, 1957, in a certain proceeding then therein depending under the style of: Petition of Railway Express Agency, Incorporated, for correction of assessment of a Franchise Tax for the year 1956, and for a refund of such Franchise Tax; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the state Corporation Commission in the penalty of five hundred dollars, with condition as the law directs.

[fol. 2] BEFORE THE STATE CORPORATION COMMISSION

PETITION OF RAILWAY EXPRESS AGENCY, INCORPORATED (FOR CORRECTION OF ASSESSMENT OF A FRANCHISE TAX FOR THE YEAR 1956, AND FOR A REFUND OF SUCH FRANCHISE TAX)

To the Honorable, The State Corporation Commission of Virginia:

Railway Express Agency, Incorporated, a corporation organized and existing under the laws of the State of Delaware and having its principal place of business at 219 East 42nd Street, New York, New York, respectfully presents [fol. 3] this Petition pursuant to the provisions of Section

58-672 of the Code of Virginia (1950), and represents to your Honorable Body as follows:

1. That is (sic) is engaged in the handling and transportation of goods, wares and merchandise in express service by means of railway cars, motor trucks and airplanes in each of the States of the United States, including the State of Virginia, in which it sought but was denied authority by this Honorable Body on April 8, 1929, to transact such business in *intrastate commerce* in this State.

2. That pursuant to the opinion of the Supreme Court of Appeals of Virginia (153 Va. 498) affirming the foregoing decision of your Honorable Body, your Petitioner caused Railway Express Agency, Incorporated, of Virginia to be organized under the laws of this State on October 20, 1931, for the purpose of conducting express service in intrastate commerce in this State, and that corporation, as a wholly owned subsidiary of your Petitioner, has since 1932 conducted the intrastate express business in Virginia theretofore conducted by your Petitioner.

3. That Railway Express Agency, Incorporated, of Virginia has since 1933 reported to your Honorable Body, been assessed with and has paid annually all taxes on property and money used and employed by it in intrastate commerce in this State, including a license tax for the years 1933 to 1955, inclusive (for the privilege of doing business in this State) based on its gross receipts from operations in this State, as required by the then provisions of Section 58-547 and its antecedent sections of the Tax Code of Virginia. That the said Virginia Company has also paid the property taxes and a franchise tax for the current year (1956) in the amount of $13,173.38, based upon its gross receipts from operations in this State in the year 1955 in the amount of $612,715.55, pursuant to the requirements of Section 58-547 of the Code, as amended March 31, 1956 (Acts 1956, page 964).

4. That your Petitioner has since 1930 reported to your Honorable Body and been assessed with and has paid annually all taxes on property and money used and employed by it in its interstate commerce in this State, and has likewise

reported, under protest, been assessed with, in the manner hereinafter stated, and has paid annually until 1953, under protest, a license tax (for the privilege of doing business in this State), allegedly based on its gross receipts from business beginning and ending within this State and on all receipts earned in this State on business passing through, into and out of this State, as required by the then provisions [fol. 4] of Section 58-547 of the Tax Code of Virginia.

Such license taxes paid by your Petitioner for the years 1950 to 1953, inclusive, were later refunded by order of this Honorable Commission, pursuant to the judgment of the Supreme Court of the United States in *Railway Express Agency, Inc.* v. *Commonwealth of Virginia* (April 5, 1954), 347 U.S. 359. Your Petitioner has also paid, under protest, on September 26, 1956, a franchise tax for the current year 1956 in the amount of $139,739.66 based on its gross receipts of $6,499,519.00, allegedly derived from business beginning and ending within this State and on all such receipts earned in this State on business passing through, into and out of this State during the year 1955, as required by Section 58-547 of the Tax Code, as amended March 31, 1956 (Acts 1956, page 947).

5. That the legality, manner of determining and amount of the license and/or franchise taxes assessable annually against your Petitioner, under authority of Section 58-547 and its antecedent sections of the Code of Virginia and under authority of Section 58-547 as amended by the Act of March 31, 1956, have been the subject of frequent hearings, formal and informal, before your Honorable Body, with the result that various methods and formulae for determining the gross receipts of your Petitioner subject to assessment in this State, and the amount of license and/or franchise taxes annually to be imposed thereon, have not been uniform or strictly within the requirements of the aforesaid sections of the Tax Code of Virginia, and, while accepting the various assessments annually made against it in this respect by your Honorable Body and while paying the license and/or franchise taxes annually imposed against it in pursuance of such assessments, allegedly under authority of the aforesaid Section 58-547 and its antecedent sections

of the Code of Virginia, and under authority of Section 58-547 as amended by the Act of March 31, 1956, your Petitioner has consistently denied liability therefor, and has paid all such taxes so imposed upon it under protest. The form of protest accompanying the annual report by your Petitioner to your Honorable Body of its gross receipts "on business passing through, into or out of this State" during the year 1955, was as follows:

"This Company does solely an interstate express business in Virginia and has no way of determining what part of the receipts derived by it from such business was earned 'in business passing through, into or out of this State'. Such [fol. 5] receipts, if otherwise ascertainable, would not be subject to franchise taxation in Virginia, however, since they are derived solely from interstate commerce and the provisions of Section 58-546 (as amended by the Act of March 31, 1956, Acts 1956, Chapter 612) making such a tax 'in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock', are, as to it, unconstitutional and void, in that the franchise tax imposed by Section 58-547 (as similarly amended) upon such gross interstate receipts, if otherwise ascertainable, would be in excess of what would be legitimate, in a constitutional sense, as an ordinary property tax upon such intangible property and rolling stock."

The remittance made by Petitioner of $139,739.66 to the Treasurer of the State of Virginia on account of the franchise tax so imposed against it for the year 1956 was expressly made "Paid Under Protest" as shown on the endorsement on the back of the draft covering that remittance.

6. That since the business of your Petitioner in the carrying of goods, wares and merchandise in express service over lines of railroads, aircraft and motor carriers operating in this State is wholly interstate in character, gross receipts derived therefrom are not subject to taxation under and by virtue of the laws of the State of Virginia, and the franchise tax sought to be imposed thereon by Section 58-547 of the Code, as amended as aforesaid, is therefore unconstitutional, null and void in that it is sought to be imposed upon the *right* and *privilege* of your Petitioner to do

an interstate express business in this State, and constitutes a direct burden upon such commerce and a tax upon your petitioner for the *privilege* of engaging therein, in contravention of the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States; that if considered a property tax upon the "good will", "use" or "going concern" value of the business of your Petitioner done in Virginia, although made "in lieu" of any state tax upon its intangible property and rolling stock, such franchise tax would also deprive your Petitioner of its property without due process of law, in violation of the provisions of the Fifth Amendment to the Constitution of the United States, since the business of your Petitioner has no such "good will", "use" or "going concern" value in the State of Virginia and the tax of $139,739.66 imposed thereon is greatly in excess of what would be a legitimate tax upon the property "in lieu" of which the aforesaid franchise tax is sought to be imposed.

[fol. 6] Wherefore, your Petitioner respectfully prays that the assessment against it by your Honorable Body of a franchise tax for the year 1956, in the amount of $139,739.66, may be reviewed and corrected, and held to be invalid, null and void, and that the said 1956 assessment may be expunged and removed from the public records, and that the State Comptroller be directed and required to draw a warrant in favor of your Petitioner on the Treasurer of the State of Virginia, pursuant to the statutes of the State of Virginia in such cases made and provided, in the amount of $139,739.66, with interest thereon from the date of payment, in refund of the tax so paid by Petitioner.

And your Petitioner will ever pray, etc.

Railway Express Agency, Incorporated. By Robert C. Hendon, Vice President.

Thomas B. Gay, W. H. Waldrop, Jr., Attorneys.

Duly sworn to by Robert C. Hendon, jurat omitted in printing.

[fol. 7] BEFORE THE STATE CORPORATION COMMISSION

ORDER RE HEARING—October 18, 1956

For correction of assessment of a franchise tax for the year 1956 and for a refund of such tax.

On October 18, 1956 came Railway Express Agency, Incorporated, a foreign public service corporation, by Thomas B. Gay, its counsel, and pursuant to §58-672 filed its application for correction and refund of the franchise tax in the amount of $139,739.66 assessed against it by the State Corporation Commission for the year 1956 and paid by it under protest to the Treasurer of Virginia on September 26, 1956, together with interest thereon from the date of payment.

It Is, Therefore Ordered:

(1) That this proceeding be instituted, assigned Case No. 13233, docketed and set for hearing at 10:00 A. M. on December 17 and 18, 1956 in the Courtroom of the State Corporation Commission, State Office Building, Richmond, Virginia in accordance with the provisions of §58-673 of the Code; and,

(2) That a copy of the petition filed herein and an attested copy of this order be sent to the Attorney General of the Commonwealth as and for the notice required to be given by §58-673 of the Code and two attested copies be sent to counsel for the applicant and one attested copy to the Director of the Division of Public Service Taxation of the Commission.

A True Copy.

Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

[fol. 8] BEFORE THE STATE CORPORATION COMMISSION

Transcript of Hearing of December 17, 1956

Present: Commissioners W. Marshall King (Chairman), H. Lester Hooker, Ralph T. Catterall.

(Commissioner Catterall presiding.)

APPEARANCES

Thomas B. Gay, Robert J. Fletcher, H. M. Pasco, and W. H. Waldrop, Jr., Counsel for Railway Express Agency, Incorporated.

Frederick T. Gray and Clarence F. Hicks, Assistant Attorneys General for the Commonwealth.

Norman S. Elliott, Counsel for State Corporation Commission.

Commissioner Catterall: All right, Mr. Gay, you may proceed.

Mr. Gay: I don't think it is necessary for me to make any opening statement about this matter, unless the Commission desires it. I think the Commission is familiar with this proceeding. It is an effort to correct the franchise tax on the petitioner, the Railway Express Agency, a Delaware corporation, for the year 1956, pursuant to the assessment for that year.

Commissioner Catterall: It might help us to get the point you make, but I assume you will file briefs?

Mr. Gay: I was going to do that, but it seems important to us to ask for an oral argument, and we will file with the Commission a copy of our brief, unless these gentlemen here have some other method of procedure to suggest.

Mr. Elliott: I have no method of procedure to suggest at this time, other than to say that I don't know what factual [fol. 9] matters will come before this Commission in this matter, but I suspect there will be a lot of complicated figures, and if that be the case I want to request an adjournment of this case so as to give us an opportunity to examine that factual material.

Commissioner Catterall: In case they present matters that you are not familiar with?

Mr. Elliott: Yes.

Mr. Gay: Section 58-673 of the Code, which is one of the sections of the article of the Code under which this proceeding is being prosecuted, requires that a copy of the Petition be served on the Attorney General. I would like to file as an exhibit with Petitioner's testimony, on the theory that the point may be jurisdictional, a copy of my letter of July twenty-sixth to Mr. Elliott enclosing three copies of the Petition for the Commission, and a copy of which was sent to the Attorney General.

Commissioner Catterall: That will be received as Exhibit A.

Mr. Elliott: The order so recites.

Commissioner Catterall: That is correct; that is covered by the order, so there is no question about that.

Mr. Gay: Mr. Jump, will you take the stand.

C. J. JUMP, a witness introduced on behalf of Petitioners, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Gay:

Q. Will you please state your name and occupation.

A. My name is C. J. Jump. I am Vice President, Administration and Finance, Railway Express Agency, Incorporated, 242 East 42nd Street, New York City.

Q. How long have you been connected with the Railway Express Agency, Incorporated?

A. Since its inception on March 1, 1929, but I have had service with the American Express Company from July 1928 to February 1929, and prior to that I was with Adams Express Company from October 1910 to June 30, 1918.

Q. I take it from what you say that the business of those two other companies was taken over by the Railway Express Agency, Incorporated?

[fol. 10] A. That is right. There were several independently owned express companies back in 1917, when the railroads of the country were placed under Federal control

by executive order of the President of the United States. Their contracts were not recognized by the Director General, who indicated that he would appoint a single agency to carry on the express business of the railways of the Country, then under Federal control, if the railroads would form such a company, and out of that grew the American Express Company. It started in July 1918, succeeding to the business of the several express companies then operating.

During the 1920's, as there were various proceedings before the Interstate Commerce Commission dealing with rates, the Commission from time to time suggested that the railroads ought to own the express business, and out of that, after thorough consideration, the Railway Express Agency was organized and purchased the express properties of the American Railway Express Company and succeeded to the express business on March 1, 1929.

Q. Did you say the railroads organized this Railway Express Agency, Incorporated?

A. That is right.

Q. Did they acquire its capital stocks?

A. Eighty-six of them acquired the capital stock by a nominal payment of $100,000. The rest of the money needed to purchase the express properties of the American Railway Express Agency was secured through a bond issuance of $32,000,000.

Q. Have those bonds since been paid off?

A. Yes, the balance was reduced to some $16,000,000 and the issue was refunded by an issuance of notes for $16,000,000 and the notes were long since paid off by money advanced by the stockholders.

Q. Which were the railroads?

A. That is right.

Q. Is the business of the Express Company, the petitioners here, conducted with the railroads owning its stock under some form of standard agreement?

A. It is conducted, not only with those railroads that now own its stock, now numbering sixty-eight, but also with a considerable number of other railroads which are not stockholders, but are parties to a standard express operations agreement effective March 1, 1954. That agreement

replaced the 25-year agreement which became effective on March 1, 1929.

[fol. 11] Commissioner Catterall: The nonholding railroads are parties to the standard agreement?

A. Yes, sir, a considerable number of them are.

Mr. Gay:

Q. As respects the owning railroads, which you say are parties to this general agreement, state in a brief way how the Express Company compensates the railroads for carrying their express matter.

Mr. Elliott: That is objected to.

Commissioner Catterall: I think we had better let them put in anything they want, for fear we might exclude something that a higher court might say we should not have excluded. Have you any particular reason for not keeping it in?

Mr. Elliott: We are dealing with the Railway Express Agency, and we are not going to go through the 321 railroads and the accounting procedures of those railroads and whether compensating to them. I think it should be confined to the taxpayer, as to what they give away of their money to the railroads. That is up to them, but the railroads are not before the Commission; but the taxpayer is before the Commission, and we will get into side issues that are not here involved, and I think it is time now to limit this proceeding to the Railway Express Agency, without going through the United States as to what railroads have agreements with them, or steamboat companies, or airplane companies.

Mr. Gay: The purpose of that question was to elicit a figure that is indisputable, that, owning the line, the standard contract is——

Commissioner Catterall: I thought the witness said the contract was with nonholding railroads, not owning stock.

Mr. Gay: No, all lines, and I was addressing my question as to those parties who are owners.

Commissioner Catterall: Do the sixty-eight owning railroads, which, for convenience, we will refer to as "the sixty-

eight," did they sign the same standard agreement as the other railroads signed?

A. Yes. There are 109 non-stockowning railroads who are parties to the standard agreement and 68 stockowning carriers.

[fol. 12] Q. And they all signed the same standard agreement, whether owners or nonowners?

A. Yes.

Mr. Gay: I don't want to go beyond the point, but to show that, with respect to the owning railroads, their part consists of the revenue of the Company over and above actual operating expenses, that the Express Company collects over and above their operating expenses, and I think Mr. Elliott is correct in his view that this is not a record in regard to the railroads, airline companies, or other lines. We are here as to whether the Railway Express Agency is liable for this franchise tax.

Mr. Elliott: I think it is utterly immaterial what the Railway Express Agency does with its money over and above its expenses; and if they don't want to retain any of it over and above their operating expenses, that is all right, but I don't think that is the inquiry here today. Taxes are liable before the railroad receives anything. I don't think that has any bearing.

Commissioner Catterall: The applicant has a right to make up the record, and I think we had better hear the evidence before we decide whether it is material or immaterial.

Mr. Gay: May I say one other thing to the Commission without belaboring the point. As I understand the purpose of this tax, as a franchise tax, as explained to the Finance Committee of the House of Delegates and the Senate by Judge Catterall at the time he and Mr. Morrissette were advocating its passage, was to assess the element of value of the Express Company's properties, which, for a better term, would be called "good will." In other words, it was something different from the "dry bones" property in the State. I think we have a right to show whether there is existent or nonexistent any such value, and this testimony bears on that subject, for what it might be worth. I think

its relevancy is apparent. Whether it is sufficiently probative in its effect to warrant the Commission's holding one way or the other is a point I am not arguing.

10:25 A. M. Commissioner Catterall: The Commission will recess for five minutes to discuss this matter.

10:30 A. M. The Commission resumes its session.

Commissioner Catterall: At this point the Commission rules that the evidence offered by the applicant is immaterial.

[fol. 13] Mr. Gay: We respectfully note an exception and reserve the point, and I would like to vouch the record a little later on as to, had the witness been permitted to answer the question, what he would have stated.

Commissioner Catterall: I think the ordinary procedure would be to put in the evidence that has been included within the ruling that, in our opinion, it is immaterial.

Mr. Gay: You will permit us to put it in, but you do not regard it as material?

Commissioner Catterall: We don't want to vouch the record, because the Commonwealth might want to cross examine on it, reserving any rights it might have.

Mr. Gay: Mrs. Wootton, will you read the question, please?

Note: Question read as follows:

"Q. As respects the owning railroads, which you say are parties to this general agreement, state in a brief way how the Express Company compensates the railroads for carrying their express matter."

Mr. Elliott: It appears from the witness's prior statement that there is in effect a contract. It seems to me that, if this evidence is to go in, it ought to go in in the form of a contract and not this witness's comment on what the contract provides.

Commissioner Catterall: Yes. I assume he has a contract. We don't want second-hand evidence of a written contract.

Mr. Gay: We have it right here.

Mr. Elliott: We don't need his interpretation of it.

Mr. Gay: We have the written contract, and I expect to introduce it into the record. It is a very voluminous docu-

ment which, for purposes of this case, is material only in a manner which can very briefly be summarized, and that is my purpose in the question asked.

Commissioner Catterall: Let the witness identify the contract.

Mr. Gay:

Q. I hand you a paper writing of March 15, 1954, and ask you to state what that document is.

A. This Standard Express Operations Agreement is a uniform agreement separately executed by 68 stockholding [fol. 14] railroads and 109 nonstockholding railroads covering the handling of express traffic by the Railway Express Agency, Incorporated.

Commissioner Catterall: Is that the agreement in effect today?

A. Yes, sir.

Mr. Gay: We offer that in evidence.

Commissioner Catterall: That will be marked "Exhibit 1, Rejected." I think any comment on what the contract means should be put in the brief, rather than in the testimony of the witness.

Mr. Gay: I don't propose to ask the witness what the contract means, because the language is the best evidence of that, but the witness is competent to say, and I think it would be informative to the Commission if he did say, how it operates.

Mr. Elliott: I don't agree with that. I think it is assumed that it operates in conformity with the agreement.

Commissioner Catterall: Don't the railroads operate under the agreement as written?

A. Yes, sir.

Mr. Gay: I wish to prove by the witness that under this document, and I started out by beginning first with the parties who are owners, that they receive their compensation for their services in transporting express matter in railway cars a certain amount of money which, in respect to their business, is what remains after the actual out-of-pocket

expenses of the Railway Express Agency in payrolls and other daily costs are paid; so that there is, in respect to the Express Company, no net revenue from the business which it conducts and which the railroads transport. The Express Company pays the difference between what the daily out-of-pocket expense is and what it receives from the public for the express matter transported, and substantially the same result comes about from the operation of the Express Company's business on nonowning lines. That is the purpose of my question.

Mr. Elliott: I don't see where that has anything to do with this case. We are talking about the Railway Express Agency, and not the owners of it or anybody else, and I think that is as far as it should go.

[fol. 15] Commissioner Catterall: I don't see any reason for asking the witness any questions about the contract. You are not offering any parol evidence to verify it?

Mr. Gay: No, we are not offering any parol evidence, but I think it is proper to explain to the Commission, as to any other court, how a contract operates, and I don't believe you can get it primarily from the four corners of the instrument, however, in saying it is spelled out in that contract.

Commissioner Catterall: We don't think oral evidence is proper for that purpose.

Mr. Gay: I understood Your Honors to rule it is not relevant.

Commissioner Catterall: No, I said it is not material. This is offered under the best evidence rule.

Mr. Gay: I don't see how, if it is excluded, what the object is to putting it in, unless the Commission felt it was——

Commissioner Catterall: There is a difference between excluding it on the question of immateriality. This is a different rule of evidence, as to a written document which the witness agrees is according to its terms and not to be explained by the witness, but it can be explained by counsel in the brief.

Mr. Gay: I am not going to labor the point, but I would like to state for the record that that is what would be stated if he had been allowed to answer.

Chairman King: What you have just said?

Mr. Gay: What I have just said. Counsel for the Com-

mission and the Assistant Attorney General appearing in this matter have stipulated with us in a manner which I will file as part of the record as Exhibit No. 2.

Commissioner Catterall: That will be filed as Exhibit No. 2.

Mr. Gay: This stipulation reads as follows:

"It is hereby stipulated by the undersigned as follows:

"First: Railway Express Agency, Incorporated, was organized under the laws of the State of Delaware in December 1928. It conducts an express business in interstate commerce and intrastate commerce in each of the states of the United States with the exception of Virginia, in which it conducts only an interstate business.

"Second: Railway Express Agency, Incorporated, of Vir- [fol. 16] ginia was organized under the laws of the State of Virginia on the 30th day of October, 1931. It conducts solely an intrastate business in the State of Virginia."

I would like to note for the purpose of the record, as we expect to rely upon it in briefs, the opinion of the Commission as reported in its 1929 Reports at Page 252 denying to Railway Express Agency, Incorporated the right to do an intrastate business in this State. That opinion of the Commission was affirmed by the Court of Appeals in Virginia in 1929, 153 Virginia 498, and it was, in turn, affirmed by the Supreme Court of the United (sic) in 1931 in 282 U.S. 440.

I don't know that we care to introduce them in the record, but I should like to have it understood that, if it is desired by either party to refer to them, that copies of the charter of the Delaware company and the Virginia company are on file in the Corporation Commission, and either party may refer to them.

Mr. Elliott: I have no objection to that.

Commissioner Catterall: That will be all right.

Mr. Gay:

Q. It appears, Mr. Jump, from the Stipulation I have just filed, that the Delaware company has done an interstate business in Virginia since 1929 or 1930, and the Virginia company has done an intrastate business in Virginia since

it was organized in 1931. Have both of those companies reported to the Commission on forms prepared and promulgated by it its respective gross receipts derived from intrastate and interstate commerce, respectively, and the property, real, tangible, and intangible, in the State?

A. Both companies have so reported.

Q. Have you prepared at my request a statement showing the amounts reflected in the returns of the Delaware company for the years 1931 to 1956, inclusive?

A. Yes, I have.

Q. Do you have such a statement available? If so, I would be obliged if you would file it.

Mr. Elliott: May I ask what the purpose of this is, please?

Mr. Gay: The purpose of it is to show that this company has, since its beginning to do an interstate business in Virginia, been assessed with gross receipts and certain prop- [fol. 17] erty taxes, and the gross receipts taxes have been continually paid under protest and on the basis of formulas determined by the Commission and not with respect to any amounts which the corporation felt had any realistic relation to its gross receipts in Virginia.

Mr. Elliott: I see no need whatsoever to go into that with respect to formulas at prior times. The Commission will recall that the Supreme Court of Virginia said, in its opinion in the former case, that the evidence showed that the Company had agreed to the formula used, and that was that. The Supreme Court of the United States said that there was no evidence to upset the formula. We are not dealing with the prior taxes, or prior formulas, or anything else, but we are dealing with the 1956 franchise taxes, and I see no reason why this record should be encumbered by matters already adjudicated and concerning prior years.

Mr. Gay: There was one other point I intended to mention as the basis for the introduction of this statement. I had not quite finished my statement.

For the first time in the history of this Company's operations in Virginia, its automotive equipment and trucks have been treated by nonassessment as rolling stock, and we expect to show by this statement that historically since 1931, this Commission has classified and assessed the automobile equipment and motor trucks of the petitioner as

tangible personal property and certified those figures to the local authorities for tangible personal property assessment. For the first time, the 1956 assessment imposes no assessment on the automotive equipment and trucks of the applicant, presumably on the theory that they are rolling stock, which is, in the applicant's view, incorrect, factually and legally and realistically.

I will amplify the exhibit now, showing the breakdown of Column F as against tangible personal property owned by the applicant. It seems to us the purpose of the Commission, although I do not undertake to exercise any psychic powers, by saying what it had in mind, but it seems that no assessment has been made this year on what the Commission for twenty-five years has considered tangible.

Commissioner Catterall: For twenty-five years the statute made no distinction between tangible personal property, and in 1956 the law was changed to exclude rolling stock, so that is why that change is made.

Mr. Gay: It has assessed the rolling stock in Virginia, [fol. 18] when it had any by tangible citus, (sic) and we expect to show that.

The second point I am trying to develop is that it seems the apparent purpose of broadening the tax base in lieu of which this franchise tax is imposed to intangible property and rolling stock. The Commission has for the first time in twenty-five years treated automobile equipment and motor equipment as rolling stock, although it had never been treated that way previously when the rolling stock had citus (sic) in Virginia. That is the dual purpose of this statement.

Commissioner Catterall: You are offering it as evidence of the administrative interpretation of the law as it was before 1956?

Mr. Gay: I will say "yes" to that, and as administrative interpretation of the law in 1956.

Commissioner Catterall: In 1956 the law said we were not to tax rolling stock.

Mr. Gay: But it did not define what rolling stock was, and there is nothing to justify the change in classification of property which for a quarter of a century has been regarded as tangible personal property into rolling stock.

Commissioner Catterall: Your contention is that a truck is not rolling stock?

Mr. Gay: The Commission has never so regarded it for twenty-five years. We did not have much, although we did have some, and when it was enough the Commission has assessed it as tangible property, but now it is assessed as rolling stock; the Commission has used rolling stock.

Commissioner Catterall: When you say "rolling stock," you mean that on rails?

Mr. Gay: Yes.

Commissioner Catterall: Which could not have a local citus? (sic)

Mr. Gay: Yes.

Commissioner Catterall: And the Legislature has said that anything on wheels is exempt.

Mr. Gay: I don't want to be presumptious (sic) in saying this, but, putting it very plainly, this "in lieu" is not——

Commissioner Catterall: That is in lieu of all taxes, which the General Assembly of Virginia could make it in lieu of.

Mr. Gay: I would like for the Commission to hear the point I am about to make, because it is the crux of our contention.

The Legislature did not say that this franchise tax shall be in lieu of all other taxes. It could not be anything but [fol. 19] rolling stock and intangible personal property, because tangible property is by the Legislature segregated, and that could not be a franchise tax in lieu of property tax, which the Legislature did not have a right to impose; so they did what the Constitution said they could do, they made it in lieu of the two kinds of property which the State had a right to control, that is, intangible property and rolling stock, and I expect to show that the only intangible property the Company has ever owned in bank balances, and that runs $100,000 and the taxes about $200.

Mr. Elliott: This is all argument.

Mr. Gay: No.

Commissioner Catterall: The whole thing is argument. Let me ask the witness one question.

Q. Did the Railway Express Agency send a check for this rolling stock, for this stock Mr. Gay says is not rolling stock?

A. As I understand, the tax has been paid under protest.

Q. Did not the Company send in the money for the tax on the rolling stock?

A. We paid a tax for a number of years on rolling stock in small amounts.

Q. Did not the State send that back, or something?

A. No, we paid the tax each year for a number of years on refrigeration car mileage.

Q. Did you not pay it in 1956 and get the money back?

A. No.

Mr. Gay: There was no assessment made against the Company, and had not been since 1950, on rolling stock, on the assumption of Mr. Maston's view that there was not sufficient rolling stock in Virginia to give it a physical citus (sic) in Virginia to warrant the tax, and that this franchise tax is in lieu thereof.

Commissioner Catterall: When you say "rolling stock," you mean rolling stock on rails, and we interpret the rolling stock to mean all rolling stock, which means motor vehicles as well?

Mr. Gay: You have done that this year. For twenty-five years you have not been interpreting it that way, but have interpreted it to mean cars on rail wheels, and the motor equipment, the trucks that run around the streets and the little trucks on the platforms, those have been in the past all treated as tangible personal property and all so reported [fol. 20] and assessed by the local authorities; and this year the Commission made no assessment on the theory that that was rolling stock, and we are trying to develop the fact that on the Commission's own interpretation as to what "tangible personal property" means, it is not only the furniture and fixtures, but the motor stock trucks, and so forth.

Mr. Elliott: I assume Mr. Gay is trying to put his own interpretation on what "rolling stock" means. The situation was that, prior to this legislation, the rolling stock was assessed as tangible personal property. It was not assessed as such this year. In the case of railroads, we have assessed all of their rolling stock, including trucks and everything else, as rolling stock. The Legislature made a complete change this year, and the Commission assessed

that, and the tax here involved is in lieu of one thing, tax on rolling stock, besides other things, so it seems to me that it is an entirely new thing for the Commission and not a matter of what has happened under an entirely different statute at a prior time.

Chairman King: Did the statute change the definition of what "rolling stock" is?

Mr. Elliott: Here is what the statute says:

"Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

Rolling stock was not mentioned in the prior statute. In other words, "rolling stock" was not segregated by the other statute.

Mr. Gay: May I read the next section, which shows the Legislature intended that the Commission should continue to do what it had been doing in taxing the tangible personal property. This is Section 58-548.

"Annual report.—Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding."

[fol. 21] Now, it seems to us perfectly apparent that the Legislature did not by that regulation attempt to reclassify for purposes of taxation the tangible personal property of these corporations which the Commission had for a quarter of a century classified the automobile traucks (sic) as tangible personal property in citus (sic) to the locality for assessment, otherwise it would have said so; but it said it should assess the tangible personal property, leaving the rolling stock to be assessed for State purposes along with intangible property, and in a number of our cases there is just no property here in lieu of which this franchise tax should be imposed.

Commissioner Catterall: The Company has no rolling stock to speak of except the automotive equipment.

Mr. Gay: Then the law is unconstitutional, since it cannot impose a franchise tax and make it in lieu of property taxes unless the tax on the property would be substantially the same as that in lieu of which the franchise tax is imposed.

Mr. Gray: It seems to me to be a rather strange way to go about interpretation of the tax, and I suppose the way to make it clear would be to make them——

Commissioner Catterall: It is purely a question of what the new law means, and the Commission in interpreting the law did not impose any taxes including its automotive equipment, so what happened before 1956 would throw no light on the 1956 statute, which was passed obviously to make the law more constitutional and not less constitutional. It makes it more constitutional if you include the automotive equipment; but you are arguing, Mr. Gay, that the Legislature wanted to make it less constitutional.

Mr. Gay: No, I think the Legislature meant to do what it was saying, that is, invoke the Constitution. Under the Constitution it may impose a franchise tax and make it in lieu of taxes on other property. Now, the only other property which this Corporation has in the State is some intangible property like money. It also has its automotive equipment and trucks in the cities and, intermittently, it has cars passing through the State, and the franchise tax has to be in lieu of all three of those. We expect to show from the statement and testimony of the witness that, even if you include the taxable values of automotive equipment or trucks, that the tax is not constitutional. But, excluding those values as the Commission has done and imposing no tax on rolling stock, you have imposed a tax of 2-3/20 in lieu of them. This is unconstitutional for the reasons I have stated.

[fol. 22] Commissioner Catterall: We will exclude the exhibit insofar as it relates to taxes prior to 1956 and, of course, you can offer any evidence on the 1956 tax.

Mr. Gay: Do I understand Your Honors are denying us the right to show the automotive equipment and trucks as tangible personal property and so classified and used?

Mr. Gray: I understood the witness testified that prior to 1956 they had so classified it. This evidence is not in conformity with that.

Mr. Gay: That was a general statement.

Mr. Gray: The evidence is that not all rolling stock or tangible personal property was so treated.

Mr. Gay: The tax on tangible personal property is segregated for local taxation, and the State would have no right to impose a franchise tax in lieu of that tax on tangible personal property.

Commissioner Catterall: The Constitution does not segregate rolling stock for public service companies and other companies.

Mr. Gay: That was held in the Eustis Freight Company case. Are we going to be denied the opportunity of presenting that?

Commissioner Catterall: The exhibit will be marked "Exhibit 3, Rejected."

Mr. Gay:

Q. This Exhibit 4, Rejected, seems to be self explanatory, Mr. Jump, and I will not ask you in detail about it, other than to inquire if it does not show the values reported by the Company, those assessed by the Commission and the taxes paid by the Company on the assessments.

A. It shows all of those things.

Q. It also shows, directing your attention for the moment to the extent to which the Commission admitted evidence as to the prior exhibit, it also shows the values reported for 1956 and those upon which the Commission made an assessment and those which it did not; is that correct?

A. That is correct.

Q. I notice that none of the taxes are shown as having been paid for 1956. Is that attributable to the fact that at the time the statement was made the local taxes had not been paid?

A. That is correct.

Mr. Gay: I take it, to digress just a moment and come back to Your Honors' general ruling on the subject, that we [fol. 23] would not be permitted to introduce the Company's protest attached to the prior assessments.

Commissioner Catterall: Only the protest that came with the 1956 record.

Mr. Gay: I just wanted to be sure.

Commissioner Catterall: That formal protest of 1956 is in the Petition?

Mr. Gay: Yes.

Mr. Elliott: We admit that in the record, without further explanation.

Commissioner Catterall: The record now shows that the tax of 1956 was paid under protest in the form shown in the Petition.

Mr. Gay:

Q. On Exhibit 4, Rejected, which you just filed, Mr. Jump, there appears a column "Automotive Equipment," and the total amount of that kind of tangible personal property reported in 1956 was $239,465.24?

A. That is correct.

Q. Have you also prepared at my request a statement showing the number of units of that type of equipment and the cities and states in which they are respectively located?

A. Yes, sir.

Mr. Gay: We would like to offer that as the next exhibit.

Commissioner Catterall: That will be Exhibit 5——

Mr. Elliott: I object to that. I think it is immaterial where it is located.

Commissioner Catterall: That is obviously immaterial.

Mr. Gay: It will be marked "Exhibit 5, Rejected," will it not?

Commissioner Catterall: Yes, Exhibit 5, Rejected.

Mr. Gay:

Q. Have you at my request prepared a statement similar to Exhibit 3 of the real estate or other property owned by the Virginia Company in the State of Virginia for the years 1933 to 1956, inclusive?

A. Yes, sir.

Mr. Gay: We offer that as the next exhibit.

Mr. Elliott: I object to that.

Commissioner Catterall: Exhibit 6, Rejected, is filed. This is the Virginia Company?

[fol. 24] Mr. Gay: Yes.

Mr. Gray: I wonder if we could inquire on what theory they want to encumber the record of this case with the Virginia Company.

Commissioner Catterall: Let me ask the witness a question about that.

Q. Mr. Jump, the Delaware Company owns all of the stock of the Virginia Company, does it not?

A. That is correct.

Q. And both companies in Virginia use in their business the same property?

A. That is correct.

Q. The same vehicles, the same real estate, the same furniture, and same everything?

A. That is correct.

Q. So whether the title of this property we are speaking of is in the Virginia Company or the Delaware Company depends on the decision of the Delaware Corporation, it could be either one or the other Company, or intermingled?

A. I don't know whether that is a question I could answer or not. There may be some legal connotation which I don't know about, but, so far as operational operations are concerned, it would be my thought that the Express Company, operating under the reasonable way they operate—we were forced by law to set up the Virginia Company to do the intrastate business, and in my opinion the intrastate business in the State of Virginia would not support a company that was operating with personnel and equipment and facilities entirely separate and by itself. If the Virginia Company were owned by the citizens of the State of Virginia, I think they would probably want to make an arrangement with the Railway Express Agency, which carries on the interstate business, for the use of joint employees, joint equipment, joint forms, and so forth. Our receipt forms carry the name of the Delaware Company. Opposite the name of the Delaware Company, it says, "For interstate shipments," and also now under that is the name of the Virginia Company, and opposite the name of the Virginia Company it says, "For intrastate shipments." The two companies have undertaken to operate in an efficient, eco-

nomical operation, but, in fact, the business is carried on by separate companies.

Q. Do you know who decides to register an automobile in the name of the Delaware Company in Virginia or the name of the Virginia Company?

[fol. 25] A. I believe all the automobiles are registered in the name of the Delaware Company. The Virginia Company pays for its proportion of use of the vehicles.

Q. And you don't know who made the decision to put it in the name of the Delaware Company or the Virginia Company?

A. I would say the management of the Delaware Company, which owns the Virginia Company, would make the decision. The Delaware Company owns all of the stock of the Virginia Company, and, for the benefit of the public that is served, we undertake to operate economically, and the equipment, the employees, and the agencies, and all of its facilities, are used jointly by the two companies, which I think would be the case if somebody else owned the Virginia Company, they would want to make an arrangement with the two companies, because the same customers operate interstate and intrastate.

11:25 A. M. Commissioner Catterall: The Commission will recess for ten minutes.

11:35 A. M. The Commission resumes its hearing.

Mr. Gay:

Q. Mr. Jump, I notice on Exhibit 4, Rejected that under the column "Other tangible personal property," that nothing was reported by the Company, and consequently no assessment was made by the Commission or taxes paid on that classification from the years 1947 to 1956. Will you explain for the record why that is true?

A. The values of the property reported in the column "Other tangible personal property," prior to 1947 was included in the other column after 1946. It represents the so-called "Minor items," which are presently classified as "Minor items," having an average cost of $50 or less. Those items were frozen in our accounts, picked out of the individual accounts for various classes of property, and trans-

ferred to a new account under the order of the Interstate Commerce Commission along about 1935. The total of that account changed very little from that time on, and the discontinuance of that separate column and inclusion of items of various classes of property in the other columns was by agreement with the representative of the State Corporation Commission in 1946. In other words, commencing with 1947 we disregarded the value of the items set up in the separate account "Minor Equipment" and actually reported [fol. 26] the units of property on hand in the various places in Virginia.

Q. Under whose instructions did you say that was done, with the State Corporation Commission of Virginia?

A. It was in accordance with an understanding with Mr. Masten, First Assistant Assessor, in a conference between him and our General Auditor, Mr. Kennedy, and our Auditor of Disbursements, Mr. Warner, and our Tax Accountant, Mr. Englehard, of Chattanooga.

Q. That is sufficient for the record. I do not observe, Mr. Jump, from Exhibit 4, Rejected, any enumeration of values of rolling stock. Have you, at my request, made an investigation of that subject, and are you prepared to state during what years, say, from 1931, the Commission has required of the Company a report of the rolling stock values and during what years any assessments were made upon it?

Mr. Elliott: As I understand, we are still vouching the record?

Commissioner Catterall: We are still just making up the record.

A. Rolling stock was not ever reported in the annual report of the Express Company to the State Corporation Commission of Virginia, but we did report, the Delaware Company reported, certain data with respect to rolling stock in the report required of carline companies.

Mr. Gay:

Q. That is on a form promulgated by the Commission?

A. Yes, sir.

Q. And what were the amounts reported, and what were

the taxes imposed, according to the Company's records, during the years I mentioned?

A. I have two reports that were available in our files in New York from 1943. A tax of $2.40 was paid on the date of December 31, 1943; and a tax of 88 cents was paid on the basis of the year ending December 31, 1944; tax of $1.60 was paid on the basis of the report for the year ending December 31, 1945; tax of $1.05 for the year ending December 31, 1946. There was no tax assessed in connection with the report for the year ending December 31, 1947; and the tax assessed on the basis of the report for year ending Decem-
[fol. 27] ber 31, 1948 amounted to $75.10. A tax of $489.89 was assessed in connection with the report for the year ending December 31, 1949. This is the report of carline companies rendered by the Railway Express Company, Incorporated.

Q. What was the nature of the rolling stock described in those reports and in respect to which those taxes were assessed?

A. They were express refrigerator cars, that is, railroad cars. There were a few horse-auto cars, but I think we never had more than half a dozen of those cars in those years, though; it was primarily refrigerator cars.

Q. Those cars were expressly owned by the Express Company?

A. Yes.

Q. It has nothing to do with the cars which the railways own and in which they transport express matters.

A. That is correct. We report mileage only for cars owned by the Railway Express Agency.

Q. What has happened since 1950? Have any taxes been assessed against the Company's refrigerator cars?

A. No, the last tax assessed was the figure in connection with the report for the year ending December 31, 1949.

Mr. Elliott: As we are passing to another subject, and as long as we are vouching the record, it appears that by a ruling of the Commission at the request of the Express Company made in 1951, its rolling stock would not be assessed as a carline company.

Mr. Gay:

Q. Mr. Jump, I hand you a photostatic copy of the Railway Express Agency's voucher of September 19, 1956, which is in the amount of $139,739.66, as well as a photostatic copy of the official receipt from the Treasurer of Virginia, apparently stamped as of September 26, 1956, acknowledging payment of the tax in the amount I have mentioned; and I would like to file those.

Commissioner Catterall: They will be clamped together and received as Exhibit 7.

Mr. Gay:

Q. I also hand you a photostatic copy of a receipt from the Treasurer of Virginia showing payment of the 1956 [fol. 28] franchise taxes by Railway Express Agency, Incorporated, of Virginia, amounting to $13,173.38, and ask you to identify that.

A. Yes.

Commissioner Catterall: That will be received as Exhibit 8.

Mr. Gay: There seems to be some confusion in the mind of my assistant as to whether in rejecting that Exhibit No. 3, which contained the figures for 1956, the rejection went to the year 1956.

Commissioner Catterall: No, sir, nothing on Exhibit 3 nor Exhibit 4 relating to the year 1956 is rejected.

Mr. Gay: That is all, if Your Honors please; that is the Applicant's case.

Mr. Elliott: May we have a few moments?

11:50 A. M. Commissioner Catterall: Yes, the Commission will recess for five minutes.

12:10 P. M. The Commission resumes its session.

Cross Examination.

By Mr. Elliott:

Q. Mr. Jump, as I understand it from your testimony, the Delaware Company has an exclusive express privilege throughout the United States, is that correct, except for intrastate commerce in the State of Virginia?

A. "Exclusive * * *" How did you put that?

Q. "Exclusive express privilege."

A. Will you read the question, please?

Note: Question read as follows:

"Q. Mr. Jump, as I understand it from your testimony, the Delaware Company has an exclusive express privilege throughout the United State, (sic) is that correct, except for intrastate commerce in the State of Virginia?"

A. You mean on railroads?

Q. Yes, as one mode of transportation.

A. The Railway Express Agency has, under the Standard Express Operations Agreement, it has the exclusive right for the conduct and transaction of express transportation business on all carriers which are parties to that agreement.

[fol. 29] Q. It also has express privileges of truck lines, air lines, and steamboat lines; is that correct, sir?

A. It has contracts with a number of air lines, a number of truck lines, and some steamboat lines.

Q. Are there other express companies operating in the United States, other than the Virginia Company?

A. There are a lot of people in the express business. There may not be anybody operating on the railroad as an express company other than the Railway Express Agency intrastate and interstate in every state except Virginia. Our Railway Express Agency of Virginia is intrastate in Virginia.

Q. You stated that the Delaware Company owns the entire capital stock of the Virginia Company?

A. That is correct.

Q. Does the Virginia Company owe any other indebtedness other than current bills? Does it have any fixed indebtedness?

A. No.

Q. Does the Virginia Company have a contract with the railroads, or does it operate exclusively through the contract of the Delaware Company?

A. I think the contract between the Virginia Company and the Delaware Company speaks for itself. It provides, in substance——

Q. Is there a written contract between the Delaware Company and the Virginia Company?

A. Yes, sir.

Q. And is there one between the Virginia Company and the railroads?

A. No, the contract between the Delaware Company and the Virginia Company was entered into in March 1932, and a copy of that contract appears in our annual report each year to the Virginia State Corporation Commission.

Q. That is the report I show you here, for the year 1955?

A. That is Page 34 of that annual report of the Virginia Company.

Q. By the way, Mr. Jump, do you have available another copy of this annual report to the Commission?

A. I have my file copy.

Q. You have no other copy?

A. No.

Commissioner Catterall: Can you get along with a copy of the contract?

[fol. 30] Mr. Elliott: I am not interested so much in the contract as the figures that appear in this report, and we will have to arrange to get a copy of the report to be filed as an exhibit in this case.

Commissioner Catterall: If that is filed as an exhibit in this case, it will be always available?

Mr. Elliott: Yes.

Commissioner Catterall: I see no objection to filing the original.

Mr. Gay: Just treat the original as on file in this case?

Mr. Elliott: Yes, we will keep it in the office downstairs, but it will be available at all times for all parties.

Mr. Gay: I think it should be given an exhibit number.

Commissioner Catterall: It will be filed as Exhibit 9 in this case.

Mr. Gay: That carries with it the privilege for either party to take any excerpts or data from it?

Commissioner Catterall: Yes, either side, but the exhibit will not go in the record, but a space will be reserved for it.

Mr. Elliott: May we do the same with the tax return of 1955?

Commissioner Catterall: That will be Exhibit 10, with the same privileges. Don't you have extra copies of that?

Mr. Elliott: We have no more copies. May the Delaware Company's report be marked as Exhibit 10, and the Virginia Company's as Exhibit 11?

Commissioner Catterall: Yes, Exhibit 10 for the Delaware Company, and Exhibit 11 for the Virginia Company.

Mr. Gay: As I understand, counsel introduced as Exhibit 9 the 1955 operating report of the Virginia Company?

Mr. Elliott: I would like to introduce them both. I would like to have the separate report for both companies, if I may, for 1955.

Mr. Gay: The Delaware Company and the Virginia Company?

Mr. Elliott: Yes, I marked the Virginia Company "Exhibit 9," and I would like to have the Delaware Company marked "Exhibit 9-A."

Commissioner Catterall: The 1955 annual report of the Delaware Corporation will be received in evidence as Exhibit 9-A, with the understanding that it will remain in the [fol. 31] tax reports of the Commission and either party may copy from it whatever it wishes.

Mr. Gay: So that there may be no confusion, when we speak of "the 1955 report," we mean the report filed in 1956 of the 1955 operations, do we not?

Commissioner Catterall: That is exactly right.

Mr. Gay: The other two exhibits, Nos. 10 and 11, respectively, were the property reports for tax purposes of the two companies.

Mr. Elliott: Plus the gross receipts returns. The complete tax returns.

Mr. Gay: The Delaware Company showed no gross receipts.

Commissioner Catterall: Are you through, Mr. Gay?

Mr. Gay: Yes.

Commissioner Catterall: You may stand aside, Mr. Jump.

Witness stood aside.

Commissioner Catterall: Have you any other witnesses, Mr. Gay?

Mr. Gay: No, that is our case.

Commissioner Catterall: In your petition you have a paragraph stating that the amount of the tax, in the amount of $139,000, was not correctly computed. Do you now waive that point?

Mr. Gay: No, sir, we don't waive it, because, in our opinion, from a legal standpoint, there is no way that a tax could be computed to yield a franchise tax to the State of Virginia based on gross receipts which would not be unconstitutional.

Commissioner Catterall: Are you disputing the amount of the assessment, in addition to the constitutionality of the assessment?

Mr. Gay: I am doing both. I am disputing the amount, in the sense I have just stated, that there is no practical way, having regard to the nature of the operations of this Company and kinds of property it has in Virginia, that a constitutional tax in lieu of the other tax could be lawfully assessed.

Commissioner Catterall: In view of that, I think the record should show how the tax was computed.

Mr. Elliott: All right. Mr. Dickerson, will you please take the stand.

[fol. 32] CHARLES W. DICKERSON, a witness introduced on behalf of the Commonwealth, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Elliott:

Q. Would you state your name, please?

A. Charles W. Dickerson.

Q. What position, if any, do you hold with the Commission?

A. Public Utilities Appraiser in the Tax Division of the State Corporation Commission.

Q. And for how long have you been engaged in that work?

A. Since 1935.

Q. You work under Mr. Masten, do you not?

A. I do.

Q. He is Director of Public Service Taxation?

A. Yes, sir.

Q. Is it a part of your duties to receive and inspect the returns made by the Railway Express Agency, the Delaware Corporation, and the Virginia Company?

A. Yes.

Q. And prior to receiving the report for the assessment of taxes for the year 1956, did you send a questionnaire to be filled in to those companies?

A. Yes.

Q. I hand you what purports to be a form of annual report for express companies to the State Corporation Commission for the year 1956 and ask you if that was the form which was sent to the Delaware Company.

A. It is.

Q. Was that also sent to the Virginia Company too?

A. Yes, it was.

Q. What is the purpose of that report, Mr. Dickerson?

A. To get from the two companies information from which we make our assessment.

Mr. Elliott: May I ask that that be received in evidence as Exhibit 12.

Commissioner Catterall: It will be received as Exhibit 12.

Mr. Elliott:

Q. Pursuant to that request for information for the purpose of assessing this tax, did the Delaware Company and the Virginia Company file returns?

[fol. 33] A. Yes, they filed returns, but not on this form. They filed returns on the old forms we used prior to 1956.

Mr. Gay: I am sure you do not want to put into the record something that is incorrect, but both Judge Catterall and Mr. Masten will remember that on the morning that Mr. Waldrop and I appeared in Judge Catterall's office for the purpose of the conference concerning the contemplated amount of the franchise tax, I handed to Mr. Masten the official report made by the Delaware Company, which is the one on file in the Commission, which is the only form we had received up to that time for reporting in the year 1955. At that interview Mr. Masten handed us for the first time

Exhibit 12. That was handed us then for the first time. I am sure this witness was not appraised (sic) of this, but I am sure Mr. Masten will advise that that is the sequence of events.

Commissioner Catterall: That is correct.

Mr. Elliott: We don't dispute that.

Mr. Gay: It is hardly fair to ask the witness if the Company reported on something different from what he received.

Mr. Elliott: He stated that the Company made the report on the old form. We take no exception to that; the circumstances are agreed to on that.

Commissioner Hooker: Was that filed before you received the new form?

Mr. Gay: Yes.

Commissioner Hooker: I thought that was the point you were making.

Mr. Gay: Yes, the point I was making is that we did not make that return in response to this. We had never seen this return up to the time it was filed.

Mr. Elliott:

Q. Did you make the assessment, or was it made under your direction and supervision or the direction and supervision of Mr. Masten, of the franchise tax of the Railway Express Agency, the Delaware Company, for the year 1956?

A. I did.

Q. And will you explain how that assessment was made by the Commission? We are speaking of the franchise tax.

Mr. Gay: It would be perfectly agreeable to us to permit the witness to file the statement before him.

[fol. 34] Mr. Elliott: It is already in evidence. It is Exhibit 10.

Mr. Gay: That was not in that report when filed by us.

Commissioner Catterall: It is in the assessment?

Mr. Gay: Not in the report, but in the assessment.

A. This is a somewhat complicated formula that was developed. In order to arrive at a figure, we worked from the amounts that were paid by the Express Company to the

various railroads that operate in Virginia. We found that the ratio of gross receipts of the Express Company to the amount paid to the railroads was approximately 2.824, and we then took the payments that were made to the Virginia railroads and raised them by that ratio to arrive at a gross revenue figure that the Express Company received from business done on the Virginia roads.

Mr. Elliott:

Q. Let me ask you right there, did you consider all railroads, or just the large railroads?

A. We included only the six largest carriers.

Q. Who are those carriers?

A. The Atlantic Coast Line; The Chesapeake & Ohio; the Norfolk & Western; Richmond, Fredericksburg & Potomac; Seaboard Air Line, and the Southern Railway.

Q. You did not, as I understand it, consider any revenue from the Atlantic & Danville Railroad Company, the Carolina & Northwestern Railway Company, the Chesapeake Western Railway Company, the Clinchfield Railroad Company, the Louisville & Nashville Railroad Company, the Norfolk Southern Railway Company, Pennsylvania Railroad Company, Virginian Railway Company, Winchester & Strasburg Railroad Company, and the Winchester & Potomac Railway Company; is that correct?

A. That is correct.

Q. Explain why those smaller railroads were not used in this calculation.

A. The amount of express business done over those railroads that you listed was so small as compared to the total that we eliminated those railroads from our calculations in order to simplify the computation.

Q. Was that favorable to the Express Company?

A. Yes, it should be.

Q. All right, sir. Now, what did you determine to be the total amount of payments to the six railroads which were used in connection with the ascertainment of this franchise tax?

[fol. 35] A. $11,467,119.00.

Q. And what did you determine to be the Virginia revenue of those railroads?

Mr. Gay: You mean express revenue?
Mr. Elliott: Yes.

A. You mean the express revenue the Express Company collected on those railroads, or the amount of payments?

Mr. Elliott:

Q. The six railroads had total payments from the Express Company of $11,467,119.00?

A. That is correct.

Q. Then, you determined what was the percentage of mileage of each of those six railroads in Virginia; is that not correct?

A. That is correct.

Q. And you multiplied that percentage by figures making up the $11,467,119.00 total; is that correct?

A. That is correct.

Q. And that gave you a total figure of how much?

A. $2,164,303.00.

Q. And that represents only the payments to the railroads from the Express Company?

A. That is correct.

Q. And in order to get that figure as to what the express receipts of the railroads in Virginia were, you had to multiply by your figure of 2.28 per cent?

A. That is correct.

Q. That gave you a figure of how much?

A. $6,111,992.00.

Q. Now, were there any other revenues considered in calculating the franchise tax, Mr. Dickerson?

A. Yes, the revenue from the air express.

Q. And what air carriers were considered in calculating that?

A. The American Airlines, Capitol Airlines, Eastern Airlines, National Airlines, and Piedmont Airlines.

Q. What was the gross express revenue of the five carriers you have just mentioned which was considered in connection with the ascertainment of this tax?

A. $16,313,707.00.

Q. The payments making up that total figure of $16,
[fol. 36] 000,000 that you have just spoken of, for that did

you apply a mileage percentage on each of these carriers in Virginia?

A. Yes.

Q. That represented the mileage they traveled in Virginia; is that correct?

A. That is correct.

Q. Or the proportion of mileage?

A. The percentage of that mileage in Virginia.

Q. And that gave you a total figure of how much?

A. $1,000,243.00.

Q. In ascertaining the total tax of $139,739.66, I wish you could explain how that figure was ascertained.

A. We added the total figure for the railroads of $6,111,992 to the total gross paid the airlines of $1,000,243, to get the total of $7,112,235.

Q. What did you subtract from that?

A. From that figure we subtracted the amount reported by the Virginia Corporation of $612,716.00.

Q. That was its intrastate receipts in Virginia; is that correct?

A. That is correct.

Q. That gave a total interstate figure of how much?

A. $6,499,419.00.

Q. And to that you applied the tax rates set up in this statute?

A. That is correct.

Q. And that gave you a total of what?

A. $139,739.66.

Q. I believe those figures you have been testifying about are shown in Exhibit No. 10; is that correct?

A. That is correct.

Q. The figures for the Virginia Company are shown in Exhibit 11?

A. That is correct.

Cross Examination.

By Mr. Gay:

Q. Mr. Dickerson, the tax report filed by the Delaware Company, which you have before you for the year 1956 re-

flecting 1955 operations, has on the first page other than the cover page, under the capitation, (sic) "Receipts," "All receipts from business beginning and ending in this State," [fol. 37] and there is nothing shown in the column opposite that, because the Delaware Company does no business in Virginia?

A. That is correct.

Q. And the next line says, "All receipts earned in Virginia on business passing through, into, or out of this State," and the report says "None."

A. That is correct.

Q. And there is attached to that a rider which states, "This company does solely an interstate express business in Virginia and has no way of determining what part of the receipts derived by it from such business was earned 'in business passing through, into, or out of this State.'" That statement appears on the protest made a part of the return, does it not?

A. Yes.

Q. In the light of that statement, as I understand your testimony, the Commission undertook to develop a formula whereby it thought an amount could be ascertained which would attribute to Virginia such part of the Company's business as passed through or into or out of this State; is that correct?

A. Yes, sir.

Q. And the document you have been testifying to reflects the Commission's view of the formula that should be employed to produce an answer to that inquiry; is that correct?

A. That is correct.

Q. There are just one or two questions I want to ask you about this statement itself. Page 1, the first classification of revenue there, dealing with gross receipts from airlines: Do those figures, aggregating $16,313,707.00, purport to reflect the gross express revenue of those five airline companies earned by the Delaware Company on those lines, or does it purport to reflect the amount the Express Company paid those lines for the privilege of carrying the express matter on those lines?

A. That reflects the total receipts for the business of the Express Company done over those lines.

Q. Presumably, what the Express Company received from the public for carrying express matter on those lines?

A. Yes, sir.

Q. You gave a reason for excluding some eight or ten railroads, not included in your computation, and the reason was that the revenue was so small that it would just have complicated the formula; is that correct?

A. Yes.

[fol. 38] Q. Did you assume the same procedure in regard to the airlines that operate in and operate out of Virginia?

A. There are other airlines that come into Virginia at the Washington Airport, and they have no substantial mileage in Virginia, and for that reason that was assumed.

Commissioner Catterall: Where did you get the figures of money taken in by the Express Company and paid by the Express Company to the railroads? From what source did you derive those figures?

A. That information was gotten from the annual operating report of the Railway Express Agency to the State Corporation Commission.

Mr. Elliott:

Q. That is Exhibit 9 and Exhibit 9-A?

A. Yes, sir.

Commissioner Catterall: You may stand aside, Mr. Dickerson.

Witness stood aside.

Commissioner Catterall: Is there anything further?

Mr. Elliott: That is all.

Commissioner Catterall: Mr. Gay, do you want to make your oral argument now, or when you file your Brief?

Mr. Gay: I would like to make it at the time we file our Brief.

Commissioner Catterall: Do you want the record to be written up before you file your Brief?

Mr. Gay: Give us a minute on that, please.

Note: The Commission recesses for five minutes.

Mr. Gay: We are in agreement that it should be preferable to have the record transcribed and set a date for the

oral argument for, say, some day when we will provide the Commission with a copy of our Brief.

Commissioner Catterall: In view of the fact that we don't know when the record will be completed, counsel can get together and agree on a date to file Briefs. The record will not be ready before January twentieth.

Mr. Gray: Is it contemplated that they will file their Brief first, and then we will reply to it?

[fol. 39] Commissioner Catterall: Mr. Gay, will you file your Brief, and then they reply to that?

Mr. Gay: Mr. Gray is correct that we should give him a copy of our Brief, and then he will have an opportunity to reply.

Commissioner Catterall: The first open date we have is February twenty-first. That would give you plenty of time to get the record and write your Brief and the Commonwealth reply to it.

Mr. Gay: That will be February twenty-first at 10:00 A. M.?

Commissioner Catterall: Yes.

Mr. Gay: If Mrs. Wootton gives us the record by January twentieth, I will give counsel my Brief within ten days thereafter, and they can give me their Brief within ten days thereafter.

BEFORE THE STATE CORPORATION COMMISSION

Transcript of Hearing of February 4, 1957

Present: Ralph T. Catterall (Chairman,) H. Lester Hooker, W. Marshall King.

(Chairman Catterall presiding.)

APPEARANCES: Thomas B. Gay and H. M. Pasco, Counsel for Railway Express Agency, Inc.

Norman S. Elliott, Counsel for State Corporation Commission.

Margaret P. Wootton, Official Court Reporter, State Corporation Commission, Richmond, Virginia.

Mr. Gay.: May it please the Commission, I have the consent of counsel, Mr. Wilson, to draw to the Commission's attention a motion which the Railway Express Agency has filed in Case No. 13233, in connection with the application [fol. 40] for refund of franchise tax. The motion is returnable today and is in writing, and I would like to have the Commission set it down for hearing.

As I understand, this case today will not take all day——

Chairman Catterall: Is there any objection to the motion, Mr. Elliott?

Mr. Elliott: I don't have any objection to it. I talked with Mr. Gray briefly over the telephone about it, and he does not seem to have any objection, and I thought the situation had been entirely cured by the conferences we had in the Chairman's office in which certain deletions were made from the record, but it seems those agreements which were reached at that time were not satisfactory. As I recall, Mr. Gay stated that, if certain deletions were made that was all that was necessary.

Chairman Catterall: He said it was entirely satisfactory to handle it in that way, but now he has a different idea and wants the record to show a piece of evidence that he would have shown had he thought of it then. Mr. Gay wants to amplify the record in the Railway Express Agency's refund case by placing in the record an affidavit or a statement of what the taxes would have been on the refrigerator cars owned by the Railway Express Agency if, during the past five years, the Commission had imposed any such tax; and I don't see any objection to putting that in at this late date, because he could have put it in at the time of the hearing, so I don't see that we need any further argument on it.

Mr. Gay: Do I understand that the motion is granted?

Chairman Catterall: The motion is granted, and the addendum in the form of an affidavit of Mr. Waldrop with two exhibits attached will be received as evidence in this case as Exhibit No. 13, and the Bailiff will stamp the number on the exhibit.

Mr. Elliott, did you call Mr. Gray this morning?

Mr. Elliott: Yes, sir. He said he had not had a chance to look it over completely, but if I had no objections, he had no objections.

Chairman Catterall: Simply putting in the exhibit does not mean that we pass on the materiality of it.

Mr. Gay: I understand the original of the motion is in the hands of one of the Commissioners, and a copy of it is here on file.

Chairman Catterall: I will give it to Mr. Pollard, and he will mark it with the appropriate exhibit number.

The Commission will recess for five minutes.

[fol. 41] BEFORE THE STATE CORPORATION COMMISSION

Application of

RAILWAY EXPRESS AGENCY, INCORPORATED

ORDER DENYING MOTION FOR CORRECTION AND REFUND—
March 1, 1957

For correction of assessment of a franchise tax for the year 1956 and for a refund of such tax.

This Proceeding was heard by the Commission on December 17, 1956 and February 21, 1957 and taken under advisement. The applicant, Railway Express Agency, Incorporated, was represented by Thomas B. Gay, H. Merrill Pasco and W. M. Waldrop, Jr., its counsel, the Commonwealth of Virginia by Frederick T. Gray, Special Assistant to the Attorney General and the State Corporation Commission by its Counsel.

Now on This Day, briefs having been filed by the parties, and the Commission having considered the evidence, the argument of counsel, and briefs submitted by counsel, is of the opinion and finds for reasons stated in an opinion this day filed herein by Catterall, Chairman and concurred in by Hooker and King, Commissioners that the relief requested in the application filed herein should be denied.

It Is Therefore, Ordered:

(1) That the application of Railway Express Agency, Incorporated for correction and refund of the franchise tax assessed by the Commission for the year 1956 pursuant to Article 4 of Chapter 12 of Title 58 of the Code, as amended, be denied and this proceeding be dropped from the docket; and

(2) That two attested copies hereof together with two copies of the opinion referred to herein be sent to Thomas B. Gay, counsel for the applicant and one attested copy hereof and a copy of said opinion be sent to the Attorney General of the Commonwealth, to Frederick T. Gray, Special Assistant to the Attorney General and to the Director of the Division of Public Service Taxation.

A True Copy.

Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

[fol. 42] BEFORE THE STATE CORPORATION COMMISSION

Application of RAILWAY EXPRESS AGENCY, INCORPORATED
For refund of 1956 Franchise Tax.

OPINION—March 1, 1957

Opinion, CATTERALL, *Chairman*.

For many years Railway Express paid its Virginia franchise tax under protest, but it took no steps to resist the tax until after the Supreme Court had announced its decision in the case of *Spector Motor Service* v. *O'Connor*, 340 U.S. 602. Inspired by the decision in that case, it petitioned for a refund and won in the Supreme Court by a vote of 5 to 4 in *Railway Express Agency* v. *Virginia*, 347 U.S. 359. The result was a substantial windfall for the Express Company at

the expense of the State of Virginia. The dissenting opinion pointed out (p. 371):

"As a result of the immunity given by today's decision, appellant and others similarly situated receive a windfall in the form of a valid claim for tax refunds extending back as far as limitations will permit. This is the result of today's twist to the Spector doctrine * * * This approach is rather hard on the states and creates additional obstacles for them in their continuing effort to make purely interstate business units pay a fair share of the cost of state facilities and services essential to the functioning of these enterprises."

The court's decision cost the state about $600,000 in taxes; and the General Assembly at its next session passed the statute now under attack. The new statute makes two changes in the law designed to overcome objections based on the commerce clause of the federal constitution. The new statute, instead of calling the tax a privilege tax, describes it as a property tax. The new tax, which is a tax on the going concern value of the business, is imposed in lieu of certain other property taxes.

Evidence was taken on December 17, 1956. Thereafter, briefs were filed and oral argument was presented. Robert [fol. 43] S. Fletcher, W. H. Waldrop, Jr., Thomas B. Gay and H. Merrill Pasco appeared for the taxpayer. Frederick T. Gray, by special appointment by the Attorney General, appeared for the Commonwealth; and Norman S. Elliott for the Commission.

Although the words of the Constitution to be construed in this case are few and simple, they have given rise to much controversy and misunderstanding. Those words are:

"The Congress shall have Power * * * To regulate Commerce * * * among the several States, * * *"

At first blush, it is hard to see how those words could have any bearing on this case. The words confer power on Congress; and Congress has passed no law that could apply here. The words do not purport to limit the powers of the states; and, when we examine the Constitution as a whole, we find that when the Framers meant to restrict the rights

of the states they used express language to say so. By following that practice, they manifested their understanding that conferring a power on Congress did not *ipso facto* deny it to the states. For example, the Constitution gives Congress power to coin money, to declare war and to raise armies. It gives the President power to make treaties. The Framers thought that that alone would not operate to keep the states from coining money, declaring war, raising armies and making treaties. They considered it necessary to add:

"No State shall enter into any Treaty, * * * coin Money * * *

"No State shall, without the Consent of Congress, * * * keep Troops, or Ships of War in time of Peace * * * or engage in War * * *"

Granting to Congress the power to lay and collect taxes and to borrow money did not keep the states from doing the same thing. Giving Congress the power to pass "uniform Laws on the subject of Bankruptcies" did not automatically deprive the states of power to pass bankruptcy laws. *Butler v. Goreley*, 146 U.S. 303, 36 L. ed. 981. Only the Commerce Clause has been given this peculiar interpretation. It alone diminishes the rights of the states without saying so. In all other instances state laws are valid unless they conflict with an affirmative prohibition in the Constitution or a constitutional Act of Congress.

How did this peculiar situation come about?

In *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23, Daniel Webster argued (p. 13):

[fol. 44] "He contended, therefore, that the people intended, in establishing the constitution, to transfer, from the several states to a general government, those high and important powers over commerce, which, in their exercise, were to maintain an uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several states, respectively, but the commerce of the United States. Henceforth, the commerce of the states was to be *an* unit, and

the system by which it was to exist and be governed, must necessarily be complete, entire and uniform. Its character was to be described in the flag which waved over it, *E Pluribus Unum*. Now, how could individual states assert a right of concurrent legislation, in a case of this sort without manifest encroachment and confusion. It should be repeated that the words used in the constitution, 'to regulate commerce' are so very general and extensive that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires."

And Chief Justice Marshall agreed with him (p. 209):

"It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

"There is great force in this argument, and the court is not satisfied that it has been refuted."

All that counsel and the court said on that interesting subject was unnecessary to the decision, because Gibbons had a federal license duly issued under an Act of Congress with which the state statute conflicted.

Brown v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678, involved the clause of the Constitution which forbids the states in express terms to "lay any imposts or duties on imports." Chief [fol. 45] Justice Marshall used the occasion to expand his theory of the self-executing effect of the Commerce Clause by asserting that there is no difference between interfering with a regulation made by Congress and interfering with the power of Congress to make the regulation.

At page 448, speaking of state duties on imports he says:

"It is too obvious for controversy, tha: they interfere equally with the power to regulate commerce."

And,

"We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce."

The fallacy of what the Chief Justice maintains ought to be "too obvious for controversy." A state law in conflict with a valid federal regulation is of course void. For that very reason, a state law that does *not* conflict with any federal regulation, could not possibly interfere with the *power* of Congress to regulate.

These dicta of the great Chief Justice are the little acorns from which have grown the impenetrable forest of decisions on the question of when the states may or may not tax or regulate interstate commerce. For the rule is not absolute. Webster, in his argument quoted above, pointed out that, in the nature of things, the rule could not be absolute. The correct statement of the rule we are considering is: "Sometimes, the states may not regulate or tax commerce among the states."

The Framers of the Constitution *did* not, and must have seen that they *could* not, impose a blanket prohibition against state regulation of interstate commerce. At that time the only law that regulated interstate commerce was state law. To abolish that law overnight by constitutional mandate would have left the whole field without law until Congress got around to legislating on it. It is quite true, as Marshall repeatedly points out, that the main reason for junking the Articles of Confederation was to confer on the central government the power to regulate interstate and foreign commerce. The Constitutional Convention solved the problem by giving Congress the power to regulate. Where regulation was needed, Congress was to adopt regulations. Until Congress acted, state regulations were to remain in full force and effect. That plan was not good enough for Webster and Marshall, and they worked out something better.

[fol. 46]. In staking out the line dividing the field in which the states were free to regulate from the field in which they

were forbidden to regulate, the court, of course, had to take each case as it came up, but felt obliged to lay down a general principle to explain what it was doing. That statement of principle, in *Cooley* v. *The Port Wardens*, 12 How. 299, 13 L. ed. 996, was (p. 319):

"Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

The court has had occasion to quote that sentence many times. Sometimes, however, it varied one of the words in the quotation, and the change of that one word greatly changed the meaning of the quotation. For example, in the *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146, the court expressed the view that the rule in *Cooley* was clear, saying:

"However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."

It will be observed that the word "ONLY" has been dropped from the declaration of the governing principle. The difference between the two methods of stating this cardinal rule of constitutional interpretation is almost as great as the difference between night and day. The omission of the word "only" after the word "admit" makes a big change in the meaning; and the most striking thing about the change is that the court did not notice that it had made a change. It was as if the court was under the mistaken impression that the sentence: "I eat spinach," means the same thing as: "I eat only spinach."

The contrast between the two methods of stating what the court considered to be the same thing is brought out by observing that practically everything *admits* of one uniform system of regulation and practically nothing *admits only* of one uniform system of regulation. The most conspicuous example of a regulation that, by absolute necessity, must be

uniform throughout the United States, is the rule that motor vehicles travelling in commerce must pass each other [fol. 47] on the right. If they passed on the right in Maine, on the left in New Hampshire, on the right in Massachusetts, on the left in Rhode Island, and so on down the coast, the consequences would be too awful to contemplate. Here, if anywhere, the court could be sure that the subject is in its nature national and admits only of one uniform system or plan of regulation; but the court has not forbidden the states to regulate this part of interstate commerce during the silence of Congress.

Thus it appears that this supposed rule that "has been asserted with great clearness" is not very clear and is not even a rule. There can be no disputing the court's pronouncement in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 420, that

"• • • the history of the commerce clause has been one of very considerable judicial oscillation."

In *Southern Pacific Company* v. *Arizona*, 325 U.S. 761, 89 L. ed. 1915, we find the court debating the policy question of whether it is better to endanger the lives of brakemen on freight trains or of motorists at grade crossings. The brakemen lost, and Mr. Justice Black was moved to remark (p. 788):

"• • • this Court to-day is acting as a 'super-legislature.'"

In *Morgan* v. *Virginia*, 328 U.S. 373, 90 L. ed. 1317, he said (concurring at page 386):

"The Commerce Clause of the Constitution provides that 'Congress shall have power • • • to regulate commerce • • • among the several States.' I have believed, and still believe that this provision means that Congress can regulate commerce and that the courts cannot. But in a series of cases decided in recent years this Court over my protest has held that the Commerce Clause justifies this Court in nullifying state legislation which this Court concludes imposes an 'undue burden' on interstate commerce. I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress."

The unenviable situation of an inferior court in deciding cases involving state regulation and taxation of interstate commerce is that it frequently cannot tell which way the Su- [fol. 48] preme Court will oscillate next. For, after all, it is not the last decision of the Supreme Court that governs the pending case, but the next decision; and the outcome of these commerce clause cases turns not on any rule of law but on how the facts of each particular case impress a majority of the Justices. In *Railway Express Agency* v. *Virginia*, 347 U.S. 359, 98 L. ed. 757, a bare majority of the court reached the conclusion that the Virginia tax on the express company was too heavy a burden on interstate commerce.

The peculiar feature of this case is that the Railway Express Agency *does no intrastate business in Virginia.* It does both kinds of business in all the other states. If it had done any intrastate business in Virginia, the decision would have gone the other way. If the case had come up from any state but Virginia, a statute in the same words as the Virginia statute would have been held constitutional. If the taxpayer had done $10 worth of business intrastate in Virginia, it would have had to pay the tax on all its interstate business in Virginia, although the burden on interstate commerce would have been the same in both cases. When we remember that it is a constitution we are construing, and when we observe that the dividing line between what the states may and may not do is drawn by the judges on considerations of policy by balancing the national interest in free movement against the local interest in regulating local affairs, it is wonderful that so fine and technical a line could be drawn: a line that bears no relation to the supposed reason for drawing a line.

The unbelievably narrow line separating a good statute from a bad one is illustrated by comparing the *Railway Express* case with the *Steamboat* cases. The Virginia statute imposing a gross receipts tax on steamboat companies was almost word for word the same as the Virginia statute imposing a gross receipts tax on express companies. There was no material difference in the law, and the only significant difference in the facts was that the steamboat companies did a little intrastate business. In the *Steamboat* cases the Supreme Court dismissed without opinion the

appeal from the Supreme Court of Appeals of Virginia. In *Railway Express Agency* v. *Virginia*, 347 U.S. 359, the court explained the difference between the *Express Company* case and the *Steamboat* cases as follows (p. 368):

"The Supreme Court of Appeals placed reliance upon our dismissal of the appeals in *Baltimore Steam Packet Co.* v. *Virginia*, 343 U.S. 923, 96 L. ed. 1335, 72 S. Ct. 763, and *Norfolk B. & C. Line, Inc.* v. *Virginia*, 343 U.S. 923, 96 L. ed. [fol. 49] 1335, 72 S. Ct. 764, and may well have been misled, since we assigned no reasons and cited no authority. In those cases, the Virginia court held an almost identical tax to be a property tax. *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. (2d) 137. But a vital distinction, so far as our jurisdiction is concerned, will account for dismissal of the appeals. One of those appellants was a Virginia corporation and derived its privilege to exist from that State. Both were engaged in intrastate as well as interstate commerce and were therefore subject to some privilege tax from the State. For our purposes, it mattered not whether the right to tax was based on those companies' privileges or on their property, since they were taxable on either basis. This fact distinguishes those dismissed cases from the one at bar and from *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, 95 L. ed. 573, 71 S. Ct. 508, *supra*."

"A vital distinction," as that phrase is used by the court, means a distinction that makes the difference between constitutionality and unconstitutionality. That vital distinction, says the court, is: "One of those appellants was a Virginia corporation * * * Both were engaged in intrastate as well as interstate commerce * * * *"

Apparently there were two vital distinctions. The Norfolk, Baltimore and Carolina Line was a Virginia corporation. If that be a vital distinction between it and Railway Express Agency, the holding of the court is that if Railway Express Agency had been a Virginia corporation it would have had to pay the tax. But the burden on interstate commerce is exactly the same whether the taxpayer is incorporated in Delaware or in Virginia.

That distinction did not exist in the case of the Baltimore Steam Packet Company. The taxpayer, like Railway Express Agency, was a foreign corporation. Consequently, the only difference between those two corporations was that Baltimore Steam Packet Company did a little intrastate business in Virginia.

In the *Baltimore Steam Packet* case the tax on gross receipts was computed on the fraction of total receipts that the miles travelled in Virginia bore to the total miles travelled. Under that allocation, the gross receipts earned in Virginia from both kinds of business was $1,158,000. Of that amount the gross receipts from transportation intrastate between Virginia ports was $2,287. The tax on the allocated interstate receipts was $18,981.20. The tax on the intrastate receipts was $34.31. So the vital distinction, the [fol. 50] difference between good and bad, is that the Steamboat Company must pay on all earnings derived from operations within the geographical boundaries of Virginia, because, and only because, *one-fifth of one percent* of those operations involved movement from one point to another within those boundaries. Because it had those *gross* receipts of $2,287 (from which the net earnings, if any, can not have been much) it was required by the Supreme Court of the United States to pay a tax of $19,000. It so happened that the tax held constitutional was 800% of the gross income that alone served to make it constitutional. That was not a borderline case. It was such a clear case that the Supreme Court dismissed the appeal without wasting time on oral argument. There can be no constitutional difference between $2,287.00 and $2.28 unless the court is prepared to draw a new line and declare that what the Framers really meant when they gave Congress power to regulate commerce was that a state tax on the privilege of engaging in interstate commerce is valid if the taxpayer does intrastate business of $2,287 but void if its gross intrastate earnings are only $2,286.

The "vital distinction" relied on by the Supreme Court to distinguish the *Baltimore Steam Packet* case from the *Railway Express* case was that one foreign corporation had no gross earnings in Virginia intrastate business and the other had $2,287 of such earnings. On that basis alone the

two cases look pretty much alike. Actually, however, when all the facts of both cases are considered, they are even more alike. It is true that the express company does no intrastate business in Virginia; but it owns all the stock of a subsidiary Virginia corporation that does do business in Virginia; and the gross receipts of that subsidiary are more than $2,287. The steamship company did all its business, interstate and intrastate, in the same steamboats manned by the same crews. The two express companies do all their business, interstate and intrastate, in the same trucks operated by the same drivers. The net earnings of Railway Express Agency of Virginia go into the pocket of the parent company, the Delaware corporation. Looking at the physical aspects of the express business and of the steamship business no relevant differences can be perceived by the naked eye. The only difference left, when all the facts are considered, is that the steamship company earned the fatal 2,287 intrastate dollars through servants employed by it; and the two express companies earned more than 2,287 intrastate dollars through servants employed by them jointly. The express business is one business carried on by two corporations, one of which owns the other.

[fol. 51] The court's opinion in *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, begins with the lament:

"This appeal from the Supreme Court of Appeals of Virginia presents another variation in the seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them."

The states have to collect taxes if they are to continue to exist as members of this indissoluble union of indestructible states, and, since most commerce is interstate commerce they have to make interstate commerce pay its way. The federal government, through its duly constituted legislative body, has practically absorbed the field of income taxes, and through its supreme judicial body has restricted other sources of state tax revenue. The duty of self preservation forces the states to press against the barriers erected by the Supreme Court, and so long as those barriers are endlessly shifting the problems will continue to be endless. The problems are endless because the super-

structure erected by the court on Marshall's dicta is not based on logic. If the first premise of an argument is not logical nothing that follows can be entirely satisfying. The most striking example of this occurs in the court's unsuccessful efforts to explain how it happens that an Act of Congress can confer on the states powers that the Constitution forbids them to exercise. If it were true that the Commerce Clause, by its own unaided force and effect, forbids the states to regulate insurance, Congress could no more authorize the states to regulate the insurance business (*Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408) than it could authorize them to pass bills of attainder. The only way out of this logical dead end is to recognize that it is not the constitution but the court that forbids the states to regulate and tax interstate commerce in fields not occupied by any Act of Congress. The key to the riddle is the first line of Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States."

No friend of states rights could be optimistic enough to expect the court to give up the power it has so long exercised of striking down state laws that, in its judgment, go too far in taxing interstate commerce. The most that can be seriously hoped for is that the court will decide close cases in favor of the states. The burden of the argument up to this point is that, if the Virginia tax on steamship lines was obviously valid, the old Virginia tax on express companies, which differed by less than a hair's breadth from the Virginia tax on steamship lines, was almost [fol. 52] obviously valid. If the steamship tax was clearly valid, the express company tax could not be void beyond a reasonable doubt, and *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, ought to be overruled.

The remainder of this opinion will deal with the two changes made by the 1956 statute. The first change was to bring the state legislature in line with the state court in treating this tax as a tax on property.

The fatal defect in the Virginia statute held unconstitutional in *Railway Express Agency* was that five Justices found that the tax was on a privilege and not on property. The manner in which the five Justices dealt with the tax is accurately described by the four Justices who dissented (347 U. S., 370):

"The Supreme Court of Appeals of Virginia has held that the instant tax is an *ad valorem* tax on intangible property; the 'operating incidence' of the tax has been labeled the 'going concern' value of appellant's physical assets in Virginia. The state court specifically held that the tax 'is not a tax upon the privilege of carrying on a business exclusively interstate in character * * *' 194 Va. 757, 760, 761, 75 S. E. (2d) 61. Hence, if we accept the determination of the state court, there is little question but that the tax is valid even under Spector.

"This Court, however, refuses to accept the Virginia court's determination and assigns to the Virginia tax the same 'privilege' label that condemned the tax in Spector. Although the Court refused to pierce the label in Spector, I do not dispute its right to re-examine a label affixed by a state court. In some cases the label may be wholly inconsistent with the state's taxing scheme; or it may be true—though I doubt it—that a state court might deliberately misbrand a tax to avoid decisions of this Court. But neither fact justifies the Court's refusal to accept the determination of the state court in this case. The name given the tax by the Virginia court meshes with the state's taxing scheme. And I do not believe that the Virginia court deliberately mislabeled the tax. Indeed, the holding of the state court is perfectly consistent with its earlier expressions on the subject and those of the State Corporation Commission, some antedating Spector. *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, 68 S. E. (2d) 137 (1951), *app dismd* 343 U. S. 923, 96 L. ed. 1335, 72 S. Ct. 763, 764 (1952); *Richmond* v. *Commonwealth* 188 Va., 600, 50 S. E. (2d) 654 (1948). Moreover, this Court does not question the existence of a going-concern value aside from the value of a business unit's physical assets."

[fol. 53] Beginning with railroads in 1902, when its present constitution was adopted, it has been the policy of Virginia to impose gross receipts taxes instead of income taxes on public utilities. From the beginning those taxes have been looked on as property taxes no matter what they were called.

Sec. 177 of the Virginia Constitution imposes "an annual State franchise tax" on railroads measured by gross receipts "for the privilege of exercising its franchise in this State * * *"

Sec. 178 allocates the tax on interstate railroads:

"By ascertaining the average gross transportation receipts per mile over its whole extent, within and without this State, and multiplying the result by the number of miles operated within this State; provided that from the sum so ascertained there may be a reasonable deduction because of any excess of value of the terminal facilities or other similar advantages in other states over similar facilities or advantages in this State."

If the tax were not a tax on property there could be no reason to adjust the tax when the value of out-of-state terminals so exceeded the value of in-state terminals as to indicate that the relationship of in-state mileage to out-of-state mileage was not a fair test of relative property values.

Sec. 170 says:

"The General Assembly * * * may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon other property * * *"

If a franchise tax were not a tax on property it could not be imposed in lieu of a tax on "other" property. Although franchise taxes were *called* taxes on a privilege, they in fact were considered to be, and were, property taxes.

This system of taxing railroads, later extended to other public utilities, was presented to the Virginia Constitutional Convention of 1902 as a tax on property. The constitution itself (Sec. 177) imposed the tax on railroads. The taxes on other companies were left to the legislature. In explaining the proposed system to the Convention, Mr. C. V. Meredith, presenting the report of the Committee on Taxation and Finance, said at page 2857 of the Debates:

"It is true that there is a difference between a tax upon a franchise and a tax upon capital. A franchise tax may

embrace all the capital or it may embrace only a portion of it. The system which we hope to see adopted in this [fol. 54] State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at;"

* * * * * * *

"I call your attention to the fact that it is our desire and hope that the Legislature will see fit to levy a system of franchise taxes by which the entire property of a corporation will be gotten at, and that it will levy a tax on the entire property. If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. Why? You know that a share of stock is not a debt. There is nobody from whom you can collect it. You are entitled to no interest on it. It is simply your title deed to your share in the corporation. It simply represents the interest which you have in this property which we propose to tax under the franchise system, if the Legislature does its duty, which we suppose it will."

Great Northern Railway Co. v. *Minnesota*, 278 U. S. 503, involved a gross receipts tax on railroads. The tax on interstate receipts was imposed "in proportion which the mileage within the state bears to the entire mileage of the railway over which such interstate business is done."

The court said (p. 507):

"The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state."

If a tax on the gross receipts of a railroad is a property tax, it would seem to follow that a tax on the gross receipts of an express company would be a property tax. And if

it *is* a property tax it ought to remain a property tax no matter what it is called. However, five Justices of the Supreme Court have held that the old Virginia tax on express companies was a privilege tax. The last sentence of the opinion of the four dissenting Justices is (347 U. S., 372):

[fol. 55] "The constitutionality of a state's tax laws should not depend on the ability of state legislatures to foresee what tax language would most likely meet this Court's approval."

The Virginia legislature, in passing the new law, has not only used the tax language most likely to meet the court's approval, but has made the new tax in lieu of other property taxes. Sec. 171 of the Virginia constitution provides:

"No State property tax for State purposes shall be levied on real estate or tangible personal property, except the rolling stock of public service corporations. Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local taxation only, and shall be assessed or reassessed for local taxation in such manner and at such times as the General Assembly has heretofore prescribed, or may hereafter prescribe, by general laws."

Local taxes on the real and tangible property of railroads, express companies and other utilities are levied by the localities on the basis of assessments made by the State Corporation Commission. In making the assessments the Commission considers only the value of the physical property, its bare bones value without any going concern value, because the going concern value is intangible property subject to taxation by the state and not by the locality. Because of the known propensity of local taxing authorities to combine low assessments with high rates, this Commission, for the protection of the utilities, assesses the physical property of state-wide utilities at 40% of its appraised value. The City of Richmond, claiming that this method of 40% assessment was unfair to it, appealed to the Supreme Court of Appeals of Virginia. *Richmond* v.

Commonwealth, 188 Va. 600, explains and upholds this method of assessment.

Sec. 171 of the Constitution, quoted above, permits the state to tax "the rolling stock of public service corporations." In the case of a public service corporation like an express company its rolling stock consists mainly of motor vehicles. The property tax on the automotive equipment of motor vehicle common carriers is assessed by the Commission under §§ 58 618 to 58-626.1 of the Code of Virginia. The history and interpretation of that tax are given in *East Coast Freight Lines* v. *Richmond*, 194 Va. 517.

Counsel for the express company argues that § 58-9 of the Code of Virginia permits the localities to tax the [fol. 56] express company's motor vehicles and that the 1956 franchise tax on express companies should not be construed to change that result by making the state franchise tax in lieu of that local property tax. The constitution of Virginia does not segregate the rolling stock of any public service corporation to either state or local taxation. The express language of § 58-546 makes the franchise tax on express companies "in lieu of property taxes on its rolling stock." There can be no doubt that § 58-546 supersedes the part of § 58-9 relied on by counsel. In *East Coast Freight Lines* v. *Richmond*, 194 Va. 517 at 524 the court said:

"We concur in the opinion of the trial judge, 'that rolling stock of public service corporations is not the subject of any constitutional segregation,' and that no statutory segregation of rolling stock of a corporation of the character of the appellant has been pointed out. The only statutory segregation provided is that contained in §58-9, Code of 1950, which segregates the rolling stock of railroads operated by steam, and §58-624, which is, as we have pointed out, inapplicable to appellant because of §58-626.1."

Next, counsel for the taxpayer argues that a tax on the intangible going concern value of a business cannot exceed a small fraction of the value of the physical property used in the business; and says that the tax in the present case is not a small fraction but a big one. But the going concern value of a business depends on the value of the busi-

ness as a going concern and not on the value of the land, machinery, equipment and tools used in the business. In *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. (ed.) 965, the court said:

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man."

* * * * * * *

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers. $4,000,000 of tangible property scattered [fol. 57] through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise, or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

In the case before us the Delaware company would have the same business it has now even if it did not own a penny's worth of tangible property in Virginia. The Delaware Company owns all the stock of the Virginia Company. The two companies do all their business in the same places in the same vehicles with the same employees. If the parent company should transfer title to all the prop-

erty used in the business to the local company, it would own no tangible property in Virginia but the going concern value of the business would not be affected in any way. The Railway Express Agency is the only big business in America that has an absolute nationwide monopoly. Counsel says that this vast monopoly has no going concern value because all its earnings go to the railroads who own it. Railway Express Agency was incorporated by the railroads and owns the monopoly as a separate entity, and it is taxable as separate entity like any other corporation. Such a monopoly built up over the years by the expenditure of millions of dollars is not the sort of property that is bought and sold in the market place, but it is nevertheless a thing of great value. It is a unique kind of property, but the fact that it is unique is not a reason for holding it to be exempt from taxation. The fact that the value of that unique property cannot be appraised in dollars and cents like a piece of real estate is a reason for measuring the tax by gross receipts. In our opinion the tax is constitutional and the application for a refund is denied.

Hooker and King, *Commissioners*, concur.

[fol. 58]

BEFORE THE STATE CORPORATION COMMISSION

ORDER RE ORIGINAL EXHIBITS—March 29, 1957

For correction of assessment of a franchise tax for the year 1956 and for a refund of such tax.

Railway Express Agency, Incorporated, having filed due notice of appeal in this case,

It Is Ordered that all of the original exhibits filed with the evidence, numbered and described as follows, be certified and forwarded to the Clerk of the Supreme Court of Appeals of Virginia to be returned by the Clerk thereof to this Commission with the mandate of that Court:

Exhibit No.	Description
A.	Letter, Oct. 18, 1956, to Counsel, State Corporation Commission, from Thomas B. Gay.
1.	Standard Express Operations Agreement.
2.	Stipulation.
3.	Rejected. Railway Express Agency, Inc., taxes and assessments.
4.	Rejected. Railway Express Agency, Inc., taxes and assessments.
5.	Rejected. Railway Express Agency, Inc., of Delaware. Automotive equipment, 1956.
6.	Rejected. Railway Express Agency, Inc., of Virginia, taxes and assessments.
[fol. 59] 7.	Cancelled check.
8.	Notice of State Taxes Assessed for 1956.
9.* 9A.* 10.* 11.*	*These exhibits, documents in the files of the State Corporation Commission, were not to go the record but numbers were given to them with the privilege for either party to take any excerpts or data from any of them and insert same as the exhibit for that particular number. No excerpts or data were presented for insertion, except excerpts from Exhibit No. 10, now identified by signature of the Chairman.
12.	Form. Annual report of express companies to the State Corporation Commission.
13.	Motion of Railway Express Agency, Inc., to supplement the record.

End

A True Copy.

Teste: N. W. Atkinson, Clerk of the State Corporation Commission.

CHAIRMAN'S CERTIFICATE TO RECORD AND EXHIBITS
(omitted in printing)

[fol. 60]

CLERK'S CERTIFICATE TO NOTICE OF APPEAL—April 1, 1957

I, N. W. Atkinson, Clerk of the State Corporation Commission, certify that within sixty days after the final order in this case Railway Express Agency, Incorporated, by Hunton, Wiliams, Gay, Moore and Powell, its Attorney, Electric Building, Richmond 12, Virginia, filed with me a notice of appeal therein which had been delivered to Counsel for the State Corporation Commission and to the Attorney General of Virginia, there being no opposing counsel, pursuant to the provisions of Section 13 of Rule 5:1 of the Rules of Supreme Court of Appeals of Virginia.

Subscribed at Richmond, Virginia, April 1, 1957.

N. W. Atkinson,

H. G. Turner, Clerk.
Clerk.

[fol. 61]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of the State Corporation Commission, Appellee.

PETITION FOR AN APPEAL FROM AN ORDER OF THE STATE CORPORATION COMMISSION—Received April 10, 1957

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Railway Express Agency, Incorporated, a Delaware corporation, respectfully represents that it is aggrieved by

the final order entered by the State Corporation Commission on March 1, 1957, in Case No. 13233, denying its application made pursuant to Section 58-672 of the Code of Virginia, 1950, for correction of assessment and refund of the franchise tax assessed and paid for the year 1956 in the amount of $139,739.66 pursuant to Section 58-547 of the Code of Virginia, 1950, as amended. A copy of said order appears in the record of the proceedings before the State Corporation Commission in this matter presented with this petition.

On March 25, 1957, counsel for petitioner filed with the Clerk of the State Corporation Commission a notice of appeal which had been delivered to the Attorney General of Virginia, the special assistant to the Attorney General of Virginia and to counsel for the Commission.

[fol. 62] Since the appeal here is of right, no statement of facts, argument or assignments of error are made in this petition. There is filed herewith as a part hereof a certified copy of the record of the proceedings before the State Corporation Commission with exhibits.

Wherefore, petitioner respectfully prays that an appeal be awarded it and that this Honorable Court review and reverse the action of the State Corporation Commission and enter an order directing the correction of the assessment of and refunding the franchise tax paid by petitioner for the year 1956 in the amount stated with interest thereon from the date of payment thereof by petitioner in accordance with the prayer of the petition filed with the State Corporation Commission on October 18, 1956.

On April 10th, 1957, copies of this petition were mailed to J. Lindsay Almond, Jr., Attorney General of the Commonwealth of Virginia, Frederick T. Gray, Special Assistant to the Attorney General of the Commonwealth of Virginia and to Norman S. Elliott, Counsel for the State Corporation Commission, prior to its being filed with the Clerk of this Honorable Court.

Respectfully submitted,

Railway Express Agency, Incorporated, by Thomas B. Gay, 1003 Electric Building, Richmond 12, Virginia, Its Attorney.

Robert J. Fletcher, William H. Waldrop, Jr., H. Merrill Pasco, of Counsel.

I, Thomas B. Gay, the undersigned counsel duly qualified to practice in the Supreme Court of Appeals of Virginia, do certify that in my opinion the order of the State Corpo-
[fol. 63] ration Commission in the above case is erroneous and that said order should be reviewed and reversed.

Given under my hand this 10th day of April, 1957.

Thomas B. Gay, 1003 Electric Building, Richmond 12, Virginia.

[fol. 64]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4742

RAILWAY EXPRESS AGENCY, INCORPORATED,

v.

COMMONWEALTH OF VIRGINIA.

OPINION BY JUSTICE ARCHIBALD C. BUCHANAN—December 2, 1957

FROM THE STATE CORPORATION COMMISSION

This is an appeal from an order of the State Corporation Commission which denied the application of the appellant made under § 58-672 of the Code for correction and refund of the franchise tax assessed against it by the Commission for the year 1956, pursuant to amended Article 4, Chapter 12, Title 58, § 58-546 through § 58-555 of the Code, as amended by Acts 1956, ch. 612, p. 964. The Code sections material to this controversy appear below.[1] In its

[1] "§ 58-546. Franchise tax on express companies.—Each express company doing business in this State shall, on or before the first day of June of each year, pay to the State a franchise tax which

opinion filed in support of its order, as required by § 156 (f) of the Virginia Constitution, the Commission held that the tax imposed by these sections was a property tax on [fol. 65] intangible property of the appellant, in lieu of other property taxes, and not prohibited by the United States Constitution.

In its Annual Report for 1956, required by the Commission pursuant to § 58-548, the appellant, in response to the inquiry on the form furnished it by the Commission as to what receipts were by it "earned in Virginia on business passing through, into or out of this State," answered

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shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock."

"§ 58-547. Amount of franchise tax.—The franchise tax shall be equal to two and three-twentieths per cent of the gross receipts derived from operations within this State. If its operations are partly within and partly without this State, the gross receipts derived from operations within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of express transported through, into, or out of this State."

"§ 58-548. Annual report.—Each express company shall report annually on or before the fifteenth day of April to the Commission on forms furnished by the Commission the facts called for on the forms to enable the Commission to assess the annual franchise tax and the value and location of its real estate and tangible personal property other than rolling stock belonging to it as of the beginning of the first day of January preceding."

"§ 58-549. Assessments by Commission.—The Commission shall, after thirty days' notice previously given by it to the company, assess the franchise tax and the value of the real estate and tangible personal property other than rolling stock. Should any company fail to make the report required by this article on or before the fifteenth day of April the Commission shall make the assessments upon the best and most reliable information that it can procure. In the execution of such duty the Commission shall be empowered to take testimony, summon and compel the attendance of witnesses and send for persons and papers."

"§ 58-553. No other taxes on express companies; exceptions.—The taxes imposed by this article and authorized to be imposed shall be in lieu of all other taxes and of all licenses, State, county and municipal, upon such companies, except that nothing herein contained shall exempt the companies from the payment of any motor vehicle license or any motor vehicle fuel tax, heretofore or hereafter imposed by law, or the annual registration fee."

"None", and attached a statement saying, in part, "This Company does solely an interstate express business in Virginia and has no way of determining what part of the [fol. 66] receipts derived by it from such business was earned 'in business passing through, into or out of this State'."

The Commission thereupon, as directed by § 58-549, proceeded to "make the assessments upon the best and most reliable information that it can procure". By a method of calculation shown in the record it determined the appellant's gross receipts from business passing through, into or out of Virginia by computing on a mileage basis the proportion which its receipts from express transported by it over six railroads (omitting ten others because *de minimis*) and five airlines operating in Virginia bore to the total receipts from express transported by the appellant over the entire lines of these carriers. The amount so ascertained as gross receipts earned in Virginia was $6,499,519, to which the 2.15% rate fixed by § 58-547 was applied, resulting in the tax of $139,739.66 assessed by the Commission against the appellant, of which it now complains.

The appellant, which will sometimes be referred to herein as the Delaware Company, was incorporated in Delaware in 1928, and does an express business in all of the States of the Union, interstate in all, and intrastate in all except Virginia. Because of the provision of § 163 of the Virginia [fol. 67] Constitution it was denied a certificate to engage in intrastate express business in this State.[2] The Delaware Company has a contract with 68 railroads which own its entire capital stock, and 109 non-stockowning railroads which gives it the exclusive right and privilege to conduct express transportation business over their lines, including those operating in Virginia.

In 1931 the Delaware Company caused to be chartered and organized under the laws of Virginia the Railway Express Agency, Incorporated, of Virginia, for the purpose of conducting a purely intrastate express business in

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[2] *Railway Express Agency, Inc.* v. *Commonwealth*, 153 Va. 498, 150 S. E. 419, *aff'd*, 282 U. S. 440, 51 S. Ct. 201, 75 L. ed. 450.

Virginia. The Delaware Company owns all the stock of the Virginia Company and in 1932 entered into a contract with it by which the Virginia Company agreed to conduct the intrastate business in Virginia on the lines of the railroads named by the Delaware Company, and to perform the obligations of the latter company with its contracting carriers concerning intrastate operations in Virginia. The contract provided for joint use by the two companies of real and personal property, equipment and employees.

On the hearing before the Commission it was stipulated [fol. 68] that the Delaware Company "conducts an express business in interstate commerce and intrastate commerce in each of the states of the United States with the exception of Virginia, in which it conducts only an interstate business," and that the Virginia Company "conducts solely an intrastate business in the State of Virginia".

Under its assignments of error on this appeal the appellant contends: (1) that § 170 of the Virginia Constitution does not authorize the imposition of this tax; that § 58-546 does not impose it; that § 58-547 provides no adequate method for determining gross receipts from interstate commerce and does not authorize the method employed by the Commission; (2) that the tax imposed is not a property tax as held by the Commission, but a tax levied upon the privilege of doing an interstate business in Virginia and hence invalid; (3) that the Commission should not have classified appellant's automotive equipment and trucks as rolling stock; and (4) that the Commission erred in rejecting as immaterial some of appellant's offered exhibits.

First. Section 170 of the Virginia Constitution provides that the General Assembly "may impose State franchise taxes," and may "make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation". Appellant's argu- [fol. 69] ment is that this should be construed to mean only domestic transportation corporations and not applied to the appellant which as a foreign corporation has been denied authority to do intrastate express business in Virginia. We do not agree. Section 170 authorizes the imposition of a franchise tax on transportation companies. The

appellant is a transportation company, so defined by § 153 of the Constitution. It owns property and does an interstate express business in Virginia. Section 158 of the Constitution says that all property, except as in the Constitution provided, shall be taxed. Certainly no exception of foreign transportation companies is in terms made in § 170 nor do we think that such an exception can be fairly inferred. Limitation on the power of the legislature to impose the tax would have to proceed from a prohibition in the Constitution, not from absence of conferred authority. The powers of the legislature are plenary except as restrained by the Constitution. 4 Mich. Jur., Constitutional Law, § 31, p. 114. We cannot say that our constitutional and statutory provisions were not intended to and do not apply to the appellant, as was said in *State* v. *Plantation Pipe Line Co.*, 265 Ala. 69, 89 So. 2d 549, to be true of the provisions of the Alabama Constitution and laws [fol. 70] under former decisions to the effect that a foreign corporation doing an exclusively interstate business in Alabama does not "do any business in this state."[3]

Section 58-546 provides that "Each express company" doing business in this State shall pay a franchise tax in

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[3] *Commonwealth* v. *Appalachian Elec. Power Co.*, 193 Va. 37, 68 S. E. 2d 122, not referred to in argument by either party in the present case, does not control decision here. That case involved the interpretation of § 58-602 of the Code imposing a tax on the money of "every corporation doing in this State" an electric utility business. The question was whether the legislature meant to tax the money of such corporation on deposit in another State and derived solely from and used in connection with operations in such other State. It was held that in view of the legislative history of the statute; the administrative practice, long undisturbed by the legislature, of not taxing such money; and the legislative intent expressed in cognate statutes, particularly the statute limiting the tax on money earned by railroad companies to the part earned in this State, it was not the purpose of § 58-602 to tax money earned and kept in another State. The sentence in that opinion, "Since section 163 of our Constitution forbids a foreign corporation to do a public service business in this State, the statute looks only to Virginia corporations which conduct a utility business in Virginia", is to be taken in its setting and confined to the statute there construed. It does not serve to change the meaning of the clear language and purpose of the Code sections now under review.

lieu of taxes on other intangible property and in lieu of property taxes on its rolling stock. Appellant is an express company doing business, interstate at least, in this State. Section 58-547 fixes the rate and provides that where operations are partly within and partly without the State, the gross receipts from operations in the State shall be all receipts on business beginning and ending within the State and all receipts from the transportation within this State of express transported through, into, or out of this [fol. 71] State. Appellant argues that in order for an express company to be subject to these provisions it must do either an intrastate business, or both an intrastate and interstate business, and since it does only an interstate business the statute does not apply to it. We are not impressed by the argument. Section 58-546 describes the corporations which must pay the tax, and § 58-547 only fixes the rate and provides how the gross receipts to which it applies shall be identified. We detect no purpose in the statute to exempt the appellant because it earns only one kind of the receipts referred to.

Section 58-547 does not undertake to prescribe the method of ascertaining the amount of these gross receipts. Sections 58-548 and 58-549 do that. The primary method is for the express company to report what these receipts are. Nobody else could as easily obtain that information. The secondary method is not needed unless the express company fails to furnish the information, which happened here. In that event the Commission is required to make the assessment on the best and most reliable information it can get. It did that by the method above stated. It is a method frequently resorted to in the fields of Federal and State taxation and doubtless necessary in the adminis- [fol. 72] tration of tax laws. As a method it is obviously authorized and seems generally considered legal.

Second. Is the tax imposed by amended sections 58-546 *ff.* a property tax as held by the Commission and contended by the Commonwealth, or is it only a tax on the privilege of conducting an interstate express business in Virginia as contended by the appellant?

In the cases of *Commonwealth* v. *Baltimore Steam Packet Co.* and *Commonwealth* v. *Norfolk, Baltimore and Carolina*

Line, Inc., 193 Va. 55, 68 S. E. 2d 137, we held that the gross receipts tax imposed on the steamship companies pursuant to what was then § 58-575 of the Code was a property tax. We so held although the statutes there involved denominated the tax a license tax levied for the privilege of doing business in this State, and in addition to the annual registration fee and property tax levied by other statutes. We there reviewed a number of Supreme Court decisions and concluded therefrom that the tax so assessed was not invalid as being a tax upon the privilege of carrying on an exclusively interstate business, but one fairly apportioned to the business carried on within the State, and was in its derivation and substance a tax on an element of value of the physical properties not other-
[fol. 73] wise taxed. Appeals from that decision were dismissed by the Supreme Court. *Baltimore Steam Packet Co. v. Commonwealth*, 343 U. S. 923, 72 S. Ct. 763, 96 L. ed. 1335; *Norfolk, Baltimore and Carolina Line, Inc.* v. *Commonwealth*, 343 U. S. 923, 72 S. Ct. 764, 96 L. ed. 1335.

Afterwards, in *Railway Express Agency, Inc.* v. *Commonwealth*, 347 U. S. 359, 74 S. Ct. 558, 98 L. ed. 757, the Supreme Court in a five to four decision reversed the holding of this court, 194 Va. 757, 75 S. E. 2d 61, that what was then § 58-547 of the Code, which imposed what that statute termed a license tax "for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided," to be measured by the gross receipts from operations in this State, was a constitutionally valid property tax measured by the gross receipts from business done in Virginia.

The Supreme Court, in the majority opinion, said that the legislature had given a "trinity of characterizations to the tax," naming it "an annual license tax," "in addition to" the property tax levied by what was then the preceding § 58-546, and laid "for the privilege of doing business in this State," and "we can only regard this tax as being in fact and effect just what the Legislature said it was—a
[fol. 74] privilege tax, and one that cannot be applied to an exclusively interstate business".

The dissenting Justices were of the opinion that the name given the tax by this court "meshes with the state's

taxing scheme," and was "perfectly consistent with its earlier expressions on the subject". The majority opinion said the court had sustained and would sustain the power of the State to tax, without discrimination, all property within its jurisdiction, and to include in its assessment "or to assess separately" the value added by the property's assemblage into a going business, "even if that business be solely interstate commerce".

In the present case we are dealing with statutes different from those before the Supreme Court in the former *Railway Express Agency* case. Present § 58-546 imposes only "a franchise tax which shall be in lieu of taxes upon all of its *other* intangible property and in lieu of property taxes on its rolling stock" (emphasis added). Section 58-547 provides that this franchise tax shall be equal to 2.15% of gross receipts derived from operations in this State. Section 58-551 permits the locality to impose a tax on real estate and tangible personal property other than rolling stock on the basis of the assessment thereof made by the [fol. 75] Commission for that purpose and at the same rate as imposed by the locality on the same kind of property. Section 58-553 provides that the taxes so imposed and authorized shall be in lieu of all other taxes and of all licenses on such companies, except the motor vehicle license or fuel tax prescribed by law or the annual registration fee.

As we pointed out in the *Steamship* cases, *supra*, our constitutional and statutory provisions furnish a uniform plan for the assessment and taxation of all public service corporations, providing for the imposition by local authorities of *ad valorem* taxes on tangible property on the basis of valuation fixed by the State Corporation Commission, and the imposition of a franchise tax measured by gross receipts for the support of the State government; and that in making the assessments of the tangible property for local taxation, the Commission must *exclude* such franchise value as may be inherent therein, with the result that only the "bare bones" value of such property is taxed by the localities, leaving the intangible or "going concern" value to be taxed by the State for the protection and services rendered by it. The statutes now under consideration fit

into and "mesh" with that scheme, and make plain, we think, the legislative intent, in keeping with the constitu-[fol. 76] tional intent from which the legislation proceeded, that the franchise tax now imposed is in fact and effect a tax on intangible property of the company, of great value, which except for this franchise tax would be immune from the payment of any tax.

As stated by the Commission in its opinion, it has been the policy of Virginia since the adoption of its present Constitution in 1902 to impose franchise taxes measured by gross receipts instead of income taxes on public utilities. The Constitution itself (§ 177) imposed the tax on railroads and the tax on other companies was left to the legislature. When the proposed system was submitted to the Convention which formulated the Constitution, its Committee on Taxation and Finance reported in part:

"* * * The system which we hope to see adopted in this State would be a system of franchise taxes by which all the property and capital of a corporation would be gotten at; * * * If that be done, if you get at all of the property, its personal property and its real estate, its intangible, invisible property, like franchises, then you have gotten at every dollar of value that the corporation owns. When you have arrived at that, you ought not to put another tax on the same property. We are suggesting a system of taxation by which the entire property of a corporation would be gotten at and that being arrived at, we say it would not be fair to tax the stock of the companies in the hands of the individual owner. * * *" Debates, Constitutional Convention, 1901-2, Vol. II, p. 2857.

[fol. 77] Consonant with the Committee's purpose, § 170 of the Constitution adopted by the Convention provides that the General Assembly "may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon *other* property". (Emphasis added.)

The fact that a franchise tax based on the gross receipts of a corporation is a tax on its intangible property was not created by the framers of the Virginia Constitution. More than six years before that Constitution was adopted

the Supreme Court of the United States had held to that effect in the case of *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683, and (on petition to rehear) 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965. The Ohio statute required express companies to file a return and to include therein "a statement of their entire gross receipts, from whatever source derived," and in taxing the value of the property in the State the assessing board was directed to be guided "by the value of the entire capital stock of said companies, and such other evidence and rules" as would lead to the true value of their property within the State, in proportion to the entire property of the companies, as determined by the value of the capital stock thereof and [fol. 78] the other evidence and rules. The assessing board fixed the value of the property of Adams Express Company to be taxed in Ohio at $533,095.80. That company had reported the value of its real estate in Ohio at $25,170 and its personal property, including moneys and credits, at $42,065; its gross receipts from all sources within the State at $282,181 and its 120,000 shares at $140 to $150 a share. The company contended that the market price of its shares afforded no reasonable basis for estimating the value of its property and that the scheme of taxation was illegal, was a tax on interstate commerce and a denial of Due Process and Equal Protection.

The court held that the value of the property of the company was not limited to its tangible items, but included its "unit of use and management," and that its horses, wagons, and furniture, its contracts for transportation facilities and the capital necessary to carry on the business, whether represented in tangible or intangible property in Ohio, "possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others," referring to railroad, telegraph and sleeping car [fol. 79] companies. The court said:

"* * * The taxation is essentially a property tax, and as such, not an interference with interstate commerce."

In the opinion denying a rehearing, 166 U. S. 185, 218-19, 17 S. Ct. 604, 605, 41 L. ed. 965, 977, the court said in reply

to the contention of the express companies that they had in the State only certain tangible personal property which must be valued as other like property and upon such value alone the assessment must be made:

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. * * * Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon the separate pieces of tangible property?"

Again it was said: "If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the goodwill of an organized and established industry must be recognized as a thing of value." 166 U. S. at 221, 17 S. Ct. at 606, 41 L. ed. at 978.

[fol. 80] "* * * Do not these intangible properties—these franchises to do—exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?" 166 U. S. at 225, 17 S. Ct. at 608, 41 L. ed. at 979.

Great Northern Ry. Co. v. *Minnesota*, 278 U. S. 503, 49 S. Ct. 191, 73 L. ed. 477, involved a Minnesota statute which imposed a tax, measured by gross receipts, upon all railroad companies, "in lieu of all taxes upon all of their property within the state". Of it the court said: "The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state." See also *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994; *United States Exp. Co.* v. *Minnesota*, 223 U. S. 335, 32 S. Ct. 211, 56 L. ed. 459;

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823, 115 A. L. R. 944; *Canton R. Co.* v. *Rogan*, 340 U. S. 511, 71 S. Ct. 447, 95 L. ed. 488.

The appellant contends that if the franchise tax be considered a property tax the amount of it is out of proportion to its property in Virginia and reflects the value of property outside of Virginia, and it complains that the Commission made no dollars and cents valuation of the intangible or going concern value of the company's property. The appellant says that it reported the value of its [fol. 81] real and tangible personal property in Virginia for 1956 at $458,565.16, and instead of determining the going concern value of that property, the Commission assessed a franchise tax on its gross receipts calculated to have been derived from business in this State.

It is to be remembered, however, that the appellant owns under its contracts the exclusive express privileges on 177 railroads of the country, as well as on truck lines, airlines and steamboat lines. From these contract privileges it earned in 1955, according to its Annual Report to the Commission, in gross operating revenues the sum of $387,854,479, and paid to the carriers the net sum of in Virginia. These earnings added a large intangible value $146,522,248. Part of this operating revenues was earned to the tangible value of the separate items of tangible properties in Virginia which were valued by the appellant at $458,565.16. Based on the proportion of Virginia mileage to system mileage, as ascertained by the Commission, these express privileges on six railroads and five airlines in Virginia earned $6,499,519 in 1955. Said the Supreme Court in *Adams Express Co.* v. *Ohio*, *supra*:

"The first question to be considered therefore is whether [fol. 82] there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible property, that it is something of no value, is to insult the common intelligence of every man." 166 U. S. at 219-20, 17 S. Ct. at 605-6, 41 L. ed. at 977.

The going concern value of a business, as said by the Commission in its opinion, "depends on the value of the business as a going concern and not on the value of the land, machinery, equipment and tools used in the business." And it added:

"In the case before us the Delaware Company would have the same business it has now even if it did not own a penny's worth of tangible property in Virginia. The Delaware Company owns all the stock of the Virginia Company. The two companies do all their business in the same places in the same vehicles with the same employees. If the parent company should transfer title to all the property used in the business to the local company, it would own no tangible property in Virginia but the going concern value of the business would not be affected in any way. The Railway Express Agency is the only big business in America that has an absolute nationwide monopoly. Counsel says that this vast monopoly has no going concern value because all its earnings go to the railroads who own it. Railway Express Agency was incorporated by the railroads and owns the monopoly as a separate entity, and it is taxable as separate entity like any other corporation. Such a monopoly built up over the years by the expenditure of millions of dollars is not the sort of property that is [fol. 83] bought and sold in the market place, but it is nevertheless a thing of great value. It is a unique kind of property, but the fact that it is unique is not a reason for holding it to be exempt from taxation. The fact that the value of that unique property cannot be appraised in dollars and cents like a piece of real estate is a reason for measuring the tax by gross receipts."

The legislature, in the statutes set out above, provided that the tax should be equal to 2.15% of the gross receipts from operations in this State and in lieu of all other taxes on intangible property and in lieu of property tax on rolling stock. For years prior to 1954 the appellant reported to the Commission the amount of its gross receipts or agreed to the amount fixed by the Commission. For 1956 it reported, as stated, that it had no way of determining its gross receipts from interstate business in Virginia and that it kept no books from which it could ascertain such

gross receipts and the cost of doing so would have been prohibitive, but without any supporting evidence to explain how much and why. The Commission thereupon ascertained in the best way it could the amount of these gross receipts to be $6,499,519. If that was too much and if there was included in the calculation, as appellant contends, the value of property outside of Virginia, it was the duty of the appellant to present evidence to show what reduction should be made, or to have explored the possi- [fol. 84] bility of an agreement about it as in prior years (*Railway Express Agency, Inc.* v. *Commonwealth*, 194 Va. 757, 75 S. E. 2d 61).

There is no evidence in the record as to the relation between the Company's property and its revenues in other States. Code § 58-672 and § 58-1122 provide ample means for correcting excessive assessments. Clearly the burden was on the appellant to produce evidence to show in what way and to what extent the assessment made by the Commission was too much. It did not do so but centered its attack on the constitutionality of the taxing statute. We take the finding of value by the Commission as *prima facie* correct, Constitution § 156 (f). It is not incredible that a property which produced gross earnings of $6,000,000 in one year would have a value of that much.

In *Adams Express Co.* v. *Ohio, supra,* the court said it was suggested that the company might have "bonds, stocks, or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation. If it has, let it show the fact. * * * It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, [fol. 85] it cannot complain if the state treats its property as all taxable." 166 U. S. at 222-3, 17 S. Ct. at 607, 41 L. ed. at 978.

Third. Appellant contends that the Commission, contrary to its former practice, classified its automotive equipment and trucks as rolling stock rather than as tangible personal property, thereby making the franchise tax displace a property tax on a larger value of the company's

properties. As stated, § 58-546 provides that the franchise tax is "in lieu of property taxes on its rolling stock" as well as in lieu of taxes on all intangibles. The appellant argues that its automotive equipment and trucks should still be treated by the Commission as tangible personal property as in former years, to be taxed by the localities. Section 171 of the Constitution provides that tangible personal property "except the rolling stock of public service corporations" shall be subject to local taxation only. The result of the Commission's action is to relieve appellant's automotive equipment and trucks of local taxation and also of State taxation except as their value is reflected in the franchise tax. This value is stated to be $262,719.63.

The Commonwealth says that this question is collateral [fol. 86] to the issue here because this is a statutory proceeding to correct an erroneous assessment, not a proceeding to compel an assessment to be made. This is true, but considering the point on its merits we think the Commission was warranted if not required by the amended statutes to classify the automotive equipment and trucks as rolling stock. Under the Constitution, § 171, *supra*, the legislature has the right to impose a State tax on rolling stock. *East Coast Freight Lines* v. *Richmond*, 194 Va. 517, 74 S. E. 2d 283. It seems logical to classify the automotive equipment and trucks used by the appellant in transporting express as rolling stock. The legislature so classified similar property in Article 11, Chapter 12, Title 58 of the Code, which requires the Commission to assess the rolling stock of motor vehicle carriers, "which shall include all busses, trucks, tractor trucks, trailers and semi-trailers and all other equipment which it is reasonably proper to class as rolling stock * * *." Having the right to tax rolling stock, the legislature clearly directed in § 58-546 that this type of tangible property should be relieved of any other taxation than that imposed by the franchise tax to be paid by the company.

Fourth. Appellant's remaining contention is that the [fol. 87] Commission erred in rejecting as immaterial its Exhibits 1 and 5 and so much of 3, 4 and 6 as did not relate to the year 1956.

Exhibit No. 1 was appellant's agreement with the railroads, offered to show that appellant's gross receipts were paid to the railroads after paying operating expenses and maintenance charges. Its annual report filed in the evidence showed that. No. 6 was a statement of the assessments and taxes of the Virginia Company, not the appellant, on its tangible and intangible property involved in its intrastate business from 1933 through 1956. No. 3 showed the gross receipts of the appellant from 1931 through 1956, except for 1954 and 1955, as determined by the Commission, together with other intangibles and tangible property and the tax imposed thereon for those years; No. 4, its tangible property, including automotive equipment and trucks, and the local taxes paid thereon for the years 1931-1956; No. 5, the number, cost and market value of its automotive equipment in the cities of the State for 1956. Appellant says these last three were material to its contention, dealt with in "Third" above, that its automotive equipment and trucks should have been assessed in 1956 as tangible property and not as rolling stock.

We agree with the Commission that these offered exhibits [fol. 88] were immaterial on the issue to which they were claimed to relate, *i.e.*, whether the franchise tax for 1956 imposed by amended § 58-546 was unconstitutional. While the exhibits might well have been received as information, and are in the record before us and have been referred to in argument so far as considered useful, yet any materiality to the questions raised is remote if at all existent, and it was not reversible error to refuse them.

For the reasons stated we hold that the franchise tax in question is a property tax, not prohibited by the Commerce Clause or other clauses of the Constitution of the United States, and validly imposed by the amended sections of the Code referred to. The order of the State Corporation Commission appealed from is accordingly

Affirmed.

[fol. 89]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4742

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

v.

COMMONWEALTH OF VIRGINIA, Appellee.

Upon an appeal of right from an order entered by the State Corporation Commission on the 1st day of March, 1957.

JUDGMENT—December 2, 1957

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the said order be, and the same is hereby affirmed, and that the appellant pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

Clerk.

[fol. 90]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND

Record No. 4742

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

v.

COMMONWEALTH OF VIRGINIA, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Received December 31, 1957

I. Notice is hereby given that Railway Express Agency, Incorporated, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of Virginia entered in this proceeding on December 2, 1957, affirming the decision of the State Corporation Commission of Virginia denying Appellant's application for correction of assessment of a franchise tax in the amount of $139,739.66 for the year 1956 and for a refund of such tax with interest thereon from date of payment.

This appeal is taken pursuant to Section 28 U.S.C. § 1257(2).

[fol. 91] II. The Clerk will please prepare a transcript of the record in this proceeding, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The petition of Railway Express Agency, Incorporated to the State Corporation Commission seeking correction of the assessment and a refund of the franchise tax assessed and paid for the year 1956 pursuant to Section 58-547 of the Virginia Code (1950), as amended.

2. The order of the State Corporation Commission dated October 18, 1956 docketing proceedings and setting date

for hearing and the transcript of testimony of the hearing held December 17, 1956.

3. The order and opinion of the State Corporation Commission of Virginia dated March 1, 1957 and the order of the State Corporation Commission dated March 29, 1957 and the original exhibits referred to therein.

4. The petition of Railway Express Agency, Incorporated to the Supreme Court of Appeals of Virginia for an appeal from the order of the State Corporation Commission of March 1, 1957.

5. Appendix to Appellant's Opening Brief filed in the Supreme Court of Appeals containing excerpts from the original exhibits.

6. The opinion and judgment of the Supreme Court of Appeals of Virginia dated and filed December 2, 1957.

7. This notice of appeal.

[fol. 92] 8. All papers filed by the parties under the requirement and authority of Rule 12 of the Rules of the Supreme Court of the United States.

9. Your certificate certifying the correctness of the transcript.

III. The following questions are presented by this appeal:

1. Whether the amount of tax imposed upon Appellant for the year 1956 pursuant to Section 58-547 of the Code of Virginia, 1950, as amended by the 1956 session of the General Assembly of Virginia was determined by the State Corporation Commission in such a manner as to constitute a violation of Appellant's rights under the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States.

2. Whether such tax as imposed upon Appellant for the year 1956 is an excise or privilege tax upon Appellant's right to do solely an interstate express business in Vir-

ginia and therefore constitutes a violation of the commerce clause of the Constitution of the United States.

Thomas B. Gay, H. Merrill Pasco, Attorneys for Railway Express Agency, Incorporated, Appellant.

Proof of Service (omitted in printing)

[fol. 94]

In Supreme Court of Appeals of Virginia

[Title omitted]

Order Staying Mandate—December 18, 1957

Upon motion of the Appellant, and for good cause shown, it is

Ordered that unless hereafter otherwise ordered by this Court or the Supreme Court of the United States, the issuance of the mandate of this Court herein be stayed until final disposition of this case by the Supreme Court of the United States provided that a notice of appeal herein is duly filed with the Clerk of this Court within thirty days after the date of this order.

Dated: December 18, 1957.

Edward W. Hudgins, Chief Justice, Supreme Court of Appeals of Virginia.

[fol. 95]

In the Supreme Court of Appeals of Virginia

[Title omitted]

Order Re Original Exhibits—January 20, 1958

It appearing to the Court that the Railway Express Agency, Incorporated, has filed its notice of appeal to the Supreme Court of the United States from a final judgment entered herein on December 2, 1957, in the above-styled cause, and it being made to appear to the Court that

certain original exhibits consisting of the Annual Report of Railway Express Agency, Incorporated, to the State Corporation Commission of the State of Virginia for the year ending December 31, 1955, stipulation of counsel, tabulations of taxes and assessments, etc., were sent up to this Court to be used in the hearing on said appeal herein are necessary and proper to be inspected by the Supreme Court of the United States on the hearing of said appeal therein, it is ordered that the Clerk of this Court in transmitting to the Supreme Court of the United States a transcript of the record in this cause shall transmit with the said record the said original exhibits for use by that Court, and that the Clerk of that Court shall, when said appeal is disposed of, return them to the Clerk of this Court, who shall thereafter transmit them to the Clerk of the State Corporation Commission, all in accordance with Rule 12 of the Supreme Court of the United States.

[fol. 96] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 96-A]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—April 14, 1958

Appeal from the Supreme Court of Appeals of the Commonwealth of Virginia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and a total of one hour and a half is allowed for argument. The case is set for argument immediately following Nos. 606 and 763.

April 14, 1958.

[fol. 97]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

APPENDIX TO APPELLANT'S OPENING BRIEF CONTAINING CERTAIN EXHIBITS

[fol. 98]

EXCERPTS FROM EXHIBIT NO. 1

STANDARD

EXPRESS OPERATIONS

AGREEMENT

BETWEEN

.....

AND

RAILWAY EXPRESS AGENCY, INCORPORATED

EFFECTIVE MARCH 1, 1954

[fol. 99]

ARTICLE I

* * *

Section 12. It is the intent of this agreement that the Express Company shall have no net taxable income. To this end the accounts between the Express Company and the Rail Company for any calendar year shall be adjusted from time to time and prior to the time the Express Company files its Federal Income Tax Returns for such year, *in such a manner as to produce no net taxable income and such returns shall be filed on this basis.* In preparing such returns and making such adjustments, the Express Company shall use its best judgment in stating the accounts in a manner appropriate under applicable provisions of the Federal Internal Revenue laws. The accounts for any calendar year shall be further adjusted for such year at

any time within three years after the last day of such calendar year to reflect any further adjustments appropriate to bring such accounts into conformity with the applicable provisions of the Internal Revenue laws all *to the end that the deductions and credits allowable to the Express Company under the Internal Revenue laws shall be exactly equal to the income of the Express Company under the Internal Revenue laws insofar as possible.* Any balance of income of the Express Company over such allowable deductions and credits for any calendar year shall be due and payable as of such calendar year *to Rail Companies party to this form of agreement under the provisions of this Article.* (pp. 36-37)

* * *

[fol. 100]

EXHIBIT 2

COMMONWEALTH OF VIRGINIA

BEFORE THE

STATE CORPORATION COMMISSION

CASE NO. 13233

PETITION

OF

RAILWAY EXPRESS AGENCY, INCORPORATED

(for Correction of Assessment of a Franchise Tax for the Year 1956, and for a Refund of Such Franchise Tax)

STIPULATION

It is hereby stipulated by the undersigned as follows:

First: Railway Express Agency, Incorporated, was organized under the laws of the State of Delaware in December 1928. It conducts an express business in inter-

state commerce and intrastate commerce in each of the [fol. 101] states of the United States with the exception of Virginia, in which it conducts only an interstate business.

Second: Railway Express Agency, Incorporated, of Virginia was organized under the laws of the State of Virginia on the 30th day of October, 1931. It conducts solely an intrastate business in the State of Virginia.

RAILWAY EXPRESS AGENCY, INCORPORATED

By (s) THOMAS B. GAY
Its Attorney

COMMONWEALTH OF VIRGINIA

By (s) C. F. HICKS
Assistant Attorney General

STATE CORPORATION COMMISSION

By (s) NORMAN S. ELLIOTT
Its Attorney

[fol. 102]

REJECTED EXHIBIT NO. 3

RAILWAY EXPRESS AGENCY, INCORPORATED

Taxes and Assessments — State of Virginia

YEAR (a)	GROSS RECEIPTS REPORTED (b)	STATE LICENSE TAX PAID ON GROSS RECEIPTS (c)	MONEY ON DEPOSIT (d)	TAXES PAID ON MONEY ON DEPOSIT (e)	REPORTED VALUE OF REAL AND TANGIBLE PERSONAL PROPERTY (f)	ASSESSMENT ON REAL AND TANGIBLE PERSONAL PROPERTY (g)	TAXES PAID ON REAL AND TANGIBLE PERSONAL PROPERTY (h)
1931	$ 3,811,395.55	$ 40,138.18	$127,900.00	$255.80	$142,708.52	$137,144.00	$3,497.88
	†(2,432,616.75)						
1932	* 3,811,395.55	35,594.19	20,460.80	40.92	136,634.41	130,739.00	3,244.03
	†(2,157,223.70)						
1933	1,034,175.00	18,033.21	11,141.00	22.82	82,107.61	86,048.00	2,128.02
1934	1,010,013.00	16,665.21	12,965.00	25.93	79,984.44	84,601.00	2,091.08
1935	1,010,877.00	16,679.47	12,880.00	25.76	68,229.89	77,946.00	1,945.68
1936	1,091,721.00	18,013.40	7,805.00	15.61	56,905.21	80,986.00	1,971.13
1937	1,143,198.00	18,862.77	12,585.00	25.17	79,472.90	63,274.00	1,470.52
1938	1,140,692.00	18,821.42	12,795.00	25.79	87,265.03	66,581.00	1,786.49
1939	1,270,795.66	20,968.13	26,795.00	53.59	107,113.74	82,107.00	1,914.73
1940	* 860,000.00	27,876.88	30,869.00	61.74	113,102.78	84,481.00	1,944.38
	†(1,689,507.60)						
1941	* 860,000.00	28,672.17	40,082.48	80.16	120,131.98	87,461.00	2,065.77
	†(1,737,707.40)						
1942	900,000.00	31,593.06	35,944.29	71.89	132,058.95	93,498.00	2,831.92
	†(1,914,730.86)						
1943	2,538,933.12	41,892.40	28,438.48	56.88	169,143.15	117,647.00	2,873.74
1944	3,414,865.06	56,345.27	61,493.37	122.99	152,012.83	111,594.00	2,708.37
1945	3,910,361.97	64,520.97	62,794.33	125.59	141,382.33	115,224.00	2,792.59
1946	4,265,031.80	70,373.02	56,878.56	113.76	130,529.10	126,167.00	3,103.26
1947	4,181,863.68	69,000.75	84,612.25	169.22	195,460.71	130,723.00	3,344.49
1948	4,270,728.28	70,467.02	79,091.51	158.18	192,458.88	127,516.00	3,312.82
1949	4,106,518.78	88,290.15	78,615.15	157.23	180,771.81	120,803.00	3,150.99
1950	3,286,775.70	70,665.68	66,445.71	132.89	175,810.54	119,979.00	3,257.69
		(Refund) *70,665.68*					
1951	3,090,916.55	66,454.71	109,906.38	219.81	193,775.70	129,279.00	3,389.65
		(Refund) *66,454.71*					
1952	* 3,134,869.38						
	† 4,635,385.00	99,660.78	107,029.22	214.06	181,317.12	125,669.00	3,200.28
		(Refund) *99,660.78*					
1953	* 3,878,805.23						
	† 6,738,240.00	144,872.16	86,009.58	172.02	158,706.87	117,563.00	3,025.99
		(Refund) *144,872.16*					
1954	(None)	—	86,003.06	172.01	144,009.65	113,451.00	2,977.54
1955	(None)	—	105,526.01	211.05	122,784.80	105,571.00	2,680.79
1956	(None)	—					
	† 6,499,519.00	‡ 139,739.66	* 120,110.70	‖ —	338,454.46	48,538.00	§ —

*Amount reported.
†Amount Assessed.

‡Paid under protest.
‖No assessment made.
§Taxes not yet paid.

[fol. 103]

REJECTED EXHIBIT NO. 4

REJECTED EXHIBIT NO. 4

RAILWAY EXPRESS AGENCY, INCORPORATED

RAILWAY EXPRESS AGENCY, INCORPORATED

Taxes and Assessments — State of Virginia

Taxes and Assessments — State of Virginia

YEAR	REPORTED VALUE OF REAL AND TANGIBLE PERSONAL PROPERTY						ASSESSMENT ON REAL AND TANGIBLE				ASSESSMENT ON REAL AND TANGIBLE PERSONAL PROPERTY					TAXES PAID ON REAL AND TANGIBLE PERSONAL PROPERTY					
	LAND AND BUILDINGS	OFFICE FURNITURE AND FIXTURES	AUTOMOTIVE EQUIPMENT	TRUCKS	OTHER TANGIBLE PERSONAL PROPERTY	TOTAL	LAND AND BUILDINGS	OFFICE FURNITURE AND FIXTURES	AUTOMOTIVE EQUIPMENT	TRUCKS	OFFICE FURNITURE AND FIXTURES	AUTOMOTIVE EQUIPMENT	TRUCKS	OTHER TANGIBLE PERSONAL PROPERTY	TOTAL	LAND AND BUILDINGS	OFFICE FURNITURE AND FIXTURES	AUTOMOTIVE EQUIPMENT	TRUCKS	OTHER TANGIBLE PERSONAL PROPERTY	TOTAL
1931	$20,433.27	$22,009.67	$ 77,841.09	$ 8,437.37	$13,987.12	$142,708.52	$24,638.00	$16,787.00	$68,850.00	$14,979.	$16,787.00	$68,850.00	$14,979.00	$11,890.00	$137,144.00	$594.78	$419.09	$1,770.39	$390.06	$323.56	$3,497.88
1932	19,486.59	19,964.96	77,367.33	7,731.93	12,083.60	136,634.41	24,638.00	16,647.00	62,960.00	14,847.	16,647.00	62,960.00	14,847.00	11,647.00	130,739.00	569.22	413.36	1,590.86	360.70	309.89	3,244.03
1933	25,542.00	15,056.55	24,090.00	6,860.33	10,558.73	82,107.61	16,250.00	13,237.00	37,000.00	7,891.	13,237.00	37,000.00	7,891.00	11,670.00	86,048.00	406.55	302.85	919.90	184.64	314.08	2,128.02
1934	25,417.00	14,722.89	17,920.00	5,848.04	9,076.51	72,984.44	16,250.00	15,121.00	34,000.00	7,569.	15,121.00	34,000.00	7,569.00	11,661.00	84,601.00	384.48	354.08	863.75	179.53	309.24	2,091.08
1935	24,917.00	12,638.50	17,290.00	5,441.76	7,942.63	68,229.89	16,250.00	15,085.00	27,320.00	7,578.	15,085.00	27,320.00	7,578.00	11,713.00	77,946.00	388.50	347.99	696.59	182.91	329.69	1,945.68
1936	16,250.00	11,659.71	16,920.00	5,095.39	6,980.11	56,905.21	16,250.00	15,467.00	29,532.00	7,720.	15,467.00	29,532.00	7,720.00	12,017.00	80,986.00	379.03	358.21	748.18	183.41	302.30	1,971.13
1937	16,200.00	11,793.95	42,296.95	5,010.90	4,171.10	79,472.90	16,200.00	15,611.00	18,647.00	7,609.	15,611.00	18,647.00	7,609.00	5,207.00	63,274.00	273.35	324.65	576.19	176.13	120.20	1,470.52
1938	16,200.00	11,711.31	49,872.78	5,514.45	3,966.49	87,265.03	16,200.00	16,643.00	21,217.00	6,715.	16,643.00	21,217.00	6,715.00	5,806.00	66,581.00	387.81	386.66	711.30	162.33	138.39	1,786.49
1939	19,100.00	15,180.35	63,144.76	5,344.58	4,344.05	107,113.74	21,100.00	19,434.00	26,948.00	7,923.	19,434.00	26,948.00	7,923.00	6,702.00	82,107.00	479.09	374.27	717.13	184.95	159.29	1,914.73
1940	19,450.00	14,998.37	69,456.12	4,797.23	4,401.06	113,102.78	21,450.00	18,339.00	29,886.00	7,898.	18,339.00	29,886.00	7,898.00	6,908.00	84,481.00	359.28	464.67	760.20	184.60	175.63	1,944.38
1941	19,450.00	15,209.69	76,229.00	5,168.45	4,074.84	120,131.98	21,450.00	19,363.00	31,862.00	7,912.	19,363.00	31,862.00	7,912.00	6,874.00	87,461.00	490.37	443.51	787.93	185.39	158.57	2,065.77
1942	21,250.00	17,052.68	81,722.00	7,164.53	4,869.74	132,058.95	21,450.00	19,669.00	35,481.00	7,988.	19,669.00	35,481.00	7,988.00	8,910.00	93,498.00	681.66	562.41	1,124.11	203.17	260.57	2,831.92
1943	42,250.00	18,040.46	98,053.03	7,254.56	3,545.10	169,143.15	32,250.00	21,601.00	48,562.00	8,258.	21,601.00	48,562.00	8,258.00	6,976.00	117,647.00	418.01	514.78	1,577.92	196.85	166.18	2,873.74
1944	30,366.00	18,959.73	92,031.00	7,248.93	3,407.17	152,012.83	28,950.00	22,770.00	44,055.00	8,535.	22,770.00	44,055.00	8,535.00	7,284.00	111,594.00	725.45	539.90	1,061.90	205.10	176.02	2,708.37
1945	30,366.00	19,336.48	81,390.00	6,851.50	3,438.25	141,382.23	28,950.00	23,158.00	45,992.00	8,520.	23,158.00	45,992.00	8,520.00	7,604.00	114,224.00	716.53	533.84	1,168.70	196.02	177.50	2,792.59
1946	33,366.00	20,732.38	65,351.00	6,611.39	4,468.33	130,529.10	31,450.00	24,274.00	52,460.00	8,288.	24,274.00	52,460.00	8,288.00	9,695.00	126,167.00	792.24	574.54	1,296.48	202.34	237.66	3,103.26
1947	32,780.00	41,647.55	94,633.00	26,400.16	—	195,460.71	32,780.00	16,669.00	71,158.00	10,116.	16,669.00	71,158.00	10,116.00	—	130,723.00	866.66	408.41	1,810.07	259.35	—	3,344.49
1948	32,780.00	43,142.34	89,214.00	27,322.54	—	192,458.88	32,780.00	17,138.00	67,532.00	10,066.	17,138.00	67,532.00	10,066.00	—	127,516.00	878.24	428.64	1,742.18	263.76	—	3,312.82
1949	32,780.00	43,640.19	77,497.00	26,854.62	—	180,771.81	32,780.00	17,333.00	60,528.00	10,162.	17,333.00	60,528.00	10,162.00	—	120,803.00	881.11	434.50	1,557.69	277.69	—	3,150.99
1950	32,780.00	44,035.25	72,133.00	26,862.29	—	175,810.54	32,780.00	18,247.00	58,680.00	10,272.	18,247.00	58,680.00	10,272.00	—	119,979.00	900.00	478.59	1,596.48	282.62	—	3,257.69
1951	32,780.00	47,050.59	87,435.00	26,510.11	—	193,775.70	32,780.00	18,646.00	67,749.00	10,104.	18,646.00	67,749.00	10,104.00	—	129,279.00	883.54	483.61	1,717.22	305.28	—	3,389.65
1952	32,780.00	44,427.48	78,623.00	25,486.64	—	181,317.12	32,780.00	17,540.00	65,631.00	9,718.	17,540.00	65,631.00	9,718.00	—	125,669.00	861.78	453.11	1,605.34	280.05	—	3,200.28
1953	32,780.00	45,658.23	56,082.00	24,186.64	—	158,706.87	32,780.00	18,120.00	57,345.00	9,318.	18,120.00	57,345.00	9,318.00	—	117,563.00	832.78	527.39	1,390.18	275.64	—	3,025.99
1954	32,780.00	47,003.29	40,269.00	23,957.36	—	144,009.65	32,780.00	18,740.00	52,691.00	9,240.	18,740.00	52,691.00	9,240.00	—	113,451.00	838.36	495.39	1,369.77	274.02	—	2,977.54
1955	28,380.00	46,986.35	24,100.13	23,318.32	—	122,784.80	33,080.00	18,722.00	44,679.00	9,090.	18,722.00	44,679.00	9,090.00	—	105,571.00	786.05	428.36	1,206.41	259.97	—	2,680.79
1956	32,850.00	42,884.83	239,465.24	23,254.39	—	338,454.46	32,850.00	15,688.00	(None)	(None	15,688.00	(None)	(None)	—	48,538.00	—	—	—	—	—	—

[fol. 104]

REJECTED EXHIBIT NO. 5

RAILWAY EXPRESS AGENCY, INCORPORATED OF DELAWARE

Automotive Equipment Shown in Annual Report of Railway Express Agency, Incorporated to the State Corporation Commission of Virginia for the Year 1956

CITY	NO. UNITS	COST	MARKET VALUE
Alexandria	8	$ 20,150.37	$ 11,876.52
Bristol	7	22,828.32	16,515.00
Charlottesville	6	11,193.30	405.00
Clifton Forge	1	1,689.78	60.00
Covington	2	2,961.06	120.00
Danville	5	7,552.97	300.00
Emporia	1	1,786.54	60.00
Farmville	1	2,020.79	505.19
Franklin	2	3,172.81	378.48
Fredericksburg	3	5,008.28	160.00
Harrisonburg	2	3,830.45	135.00
Lexington	1	1,792.21	60.00
Lynchburg	16	27,473.24	6,882.39
Newport News	11	29,857.67	22,602.32
Norfolk	59	166,627.63	88,960.16
Orange	1	1,743.37	
Petersburg	6	9,829.00	1,150.65
Pulaski	1	3,171.56	1,057.08
Richmond	55	137,205.12	78,476.02
Roanoke	14	28,852.98	8,291.49
South Boston	1	1,648.21	60.00
Staunton	3	5,131.84	195.00
Suffolk	2	3,085.86	120.00
Virginia Beach	2	3,670.80	574.94
Waynesboro	3	4,599.75	180.00
Winchester	2	3,416.52	120.00
	215	$510,300.43	$239,465.24

[fol. 105]

REJECTED EXHIBIT NO. 6

RAILWAY EXPRESS AGENCY, INCORPORATED OF VIRGINIA

Taxes and Assessments

YEAR	GROSS RECEIPTS REPORTED	STATE LICENSE TAX PAID ON GROSS RECEIPTS	MONEY ON DEPOSIT	TAXES PAID ON MONEY ON DEPOSIT	REAL ESTATE		
					REPORTED VALUE	ASSESSMENT	AMOUNT OF TAXES PAID
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
1933	$ 224,944.50	$ 3,712.41	$ 5,000.00	$10.00	$ —	$ —	$ —
1934	270,400.86	4,461.61	5,000.00	10.00	—	—	—
1935	333,055.97	5,495.42	5,000.00	10.00	—	—	—
1936	353,859.69	5,838.68	5,000.00	10.00	—	—	—
1937	419,128.97	6,915.63	5,000.00	10.00	—	—	—
1938	420,969.53	6,946.00	5,000.00	10.00	—	—	—
1939	455,464.82	7,515.17	5,000.00	10.00	—	—	—
1940	534,390.39	8,817.44	5,000.00	10.00	—	—	—
1941	571,645.26	9,432.15	5,000.00	10.00	—	—	—
1942	657,396.71	10,847.05	5,000.00	10.00	—	—	—
1943	827,080.19	13,646.82	23,871.75	47.56	—	—	—
1944	945,619.00	15,602.71	2,986.16	5.97	20,700.00	24,500.00	586.90
1945	1,012,600.63	16,707.91	1,838.18	3.68	20,700.00	24,500.00	586.90
1946	1,047,838.92	17,289.34	2,665.90	5.33	20,700.00	24,500.00	586.90
1947	1,163,375.81	19,195.70	2,671.00	5.34	20,700.00	24,500.00	586.90
1948	1,236,392.60	20,400.48	2,853.56	5.71	20,700.00	24,500.00	586.90
1949	987,161.57	21,223.97	3,275.79	6.55	20,700.00	24,500.00	630.90
1950	949,298.77	16,109.92	3,944.48	7.89	20,700.00	26,500.00	583.00
1951	622,211.90	13,377.56	2,709.83	5.42	20,700.00	26,500.00	583.00
1952	* 600,982.85						
	† 616,277.40	13,249.96	2,198.13	4.40	20,700.00	26,500.00	583.00
1953	706,564.62	15,191.14	1,896.30	3.79	20,700.00	26,500.00	583.00
1954	669,830.64	14,401.36	2,290.16	4.58	20,700.00	26,500.00	583.00
1955	642,841.97	13,821.10	2,711.16	5.42	20,700.00	30,080.00	571.52
1956	612,715.55	13,173.38	3,137.63	‡ —	20,700.00	30,080.00	565.50

* Amount reported.
† Amount assessed.
‡ No taxes assessed for money on deposit.

EXCERPTS FROM EXHIBIT 9-A

ANNUAL REPORT

OF

RAILWAY EXPRESS AGENCY, INCORPORATED

TO THE

STATE CORPORATION COMMISSION

OF THE

STATE OF VIRGINIA

FOR THE

YEAR ENDED DECEMBER 31, 1955

Pages 10-A, 11, 11-B and 13-B of this Exhibit show in part the following:

RAILROAD MILEAGE

LINE	SYSTEM	VIRGINIA	PER CENT*
Atlantic Coast Line	4,808.14	106.15	2.21
Chesapeake & Ohio	2,717.08	633.20	23.30
Norfolk & Western	1,779.54	1,072.78	60.28
Richmond, Fredericksburg & Potomac	113.10	109.67	96.97
Seaboard Air Line	3,732.67	158.80	4.25
Southern Railway	4,892.15	432.71	8.85

AIRCRAFT MILEAGE

LINE	SYSTEM	VIRGINIA	PER CENT*
American	8,199.	478.	5.83
Capital	5,261.	308.	5.85
Eastern	8,216.	481.	5.85
National	1,358.		
Piedmont	2,366.	530.	22.40

*These percentages are computed and correspond to the percentages shown on the formula used by the Commission in computing the franchise tax of $139,739.66 appearing as a schedule with Exhibit 10.

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(EXHIBIT PAGE 15)

[fol. 107]

MILEAGE COVERED — Continued

MILEAGE BY STATES AND TERRITORIES

STATE OR TERRITORY (a)	STEAM-ROAD MILEAGE (b)	ELECTRIC-LINE MILEAGE (c)	COASTWISE STEAMBOAT-LINE MILEAGE (d)	INLAND STEAMBOAT-LINE MILEAGE (e)	MOTOR CARRIER LINES (f)	MISCELLANEOUS MILEAGE (g)	TOTAL MILEAGE (h)
Alabama	3,587.80				132.60	2,077.58	5,797.98
Alaska	504.30		4,835.00			1,700.00	7,039.30
Arizona	2,057.80				322.25	2,593.30	4,973.35
Arkansas	2,965.77				1,808.60	1,714.00	6,488.37
California	4,858.58	34.90			3,656.60	6,478.21	15,028.29
Colorado	3,665.44				233.90	1,855.00	5,754.34
Connecticut	710.06					812.00	1,522.06
Delaware	314.20					290.00	604.20
Dist. of Columbia	18.78					85.00	103.78
Florida	4,186.18				295.70	2,825.00	7,306.88
Georgia	5,348.43				207.90	2,889.00	8,445.33
Hawaii	—		557.00		23.70		580.70
Idaho	2,042.91				33.49	920.00	2,996.40
Illinois	8,305.76	257.63			500.50	3,143.00	12,206.89
Indiana	5,565.88				1,481.50	3,187.50	10,234.88
Iowa	8,685.11	104.60			45.00	1,521.00	10,355.71
Kansas	7,737.28				953.24	1,717.00	10,407.52
Kentucky	2,770.77				62.10	1,576.50	4,409.37
Louisiana	2,738.20				2,107.00	1,830.00	6,675.20
Maine	1,382.92				246.80	717.07	2,346.79
Maryland	1,050.40			98.30	155.90	962.00	2,266.60
Massachusetts	1,167.61		58.80		11.40	1,040.45	2,278.26
Michigan	4,143.54			8.00	119.60	2,083.00	6,354.14
Minnesota	7,399.93				78.50	2,022.00	9,500.43
Mississippi	2,133.37				188.00	1,810.50	4,131.87
Missouri	6,118.13	2.67			728.70	2,448.57	9,298.07
Montana	4,739.63				52.80	1,996.00	6,788.43
Nebraska	5,548.55					879.00	6,427.55
Nevada	1,334.21				397.70	1,042.00	2,773.91
New Hampshire	839.94				20.00	181.00	1,040.94
New Jersey	1,079.81					1,306.89	2,386.70
New Mexico	2,309.55				256.50	2,412.00	4,978.05
New York	5,679.47				178.90	4,036.59	9,894.96
North Carolina	3,128.98				380.20	2,592.23	6,101.41
North Dakota	5,146.57					1,275.00	6,421.57
Ohio	5,868.51				46.50	3,618.00	9,533.01
Oklahoma	4,945.19				39.50	2,852.00	7,836.69
Oregon	1,783.29	4.73			1,254.14	1,799.10	4,841.26
Pennsylvania	4,348.06				312.10	5,851.00	10,511.16
Rhode Island	61.35			14.90	2.60	169.00	247.85
South Carolina	2,892.96				129.00	1,621.60	4,643.56
South Dakota	3,583.66				86.00	1,239.00	4,908.66
Tennessee	2,680.64				71.20	1,879.00	4,630.84
Texas	9,823.59				3,981.80	11,240.00	25,045.39
Utah	1,457.25	36.00			62.00	1,340.00	2,895.25
Vermont	654.59					232.00	886.59
Virginia	3,215.30			87.00	491.60	2,325.00	6,118.90
Washington	3,214.69	37.83	225.00	167.00	557.51	2,375.00	6,577.03
West Virginia	2,073.19				46.70	1,630.00	3,749.89
Wisconsin	5,894.91				603.10	1,885.00	8,383.01
Wyoming	1,875.68				29.00	1,990.00	3,894.68
Total U. S.	173,638.72	478.36	5,675.80	375.20	22,391.83	106,064.09	308,624.00

~~(EXHIBIT PAGE 27)~~

[fol. 108]

COST OF REAL PROPERTY AND EQUIPMENT

ACCOUNT (a)	EXPENDITURES FOR REAL PROPERTY AND EQUIPMENT DURING THE YEAR: FROM SPECIAL APPROPRIATIONS AND THROUGH ISSUE OF SECURITIES (b)	FROM CASH OR OTHER WORKING ASSETS (c)	CREDITS FOR PROPERTY RETIRED (d)	TOTAL COST TO CLOSE OF PRECEDING YEAR (e)	TOTAL COST TO CLOSE OF YEAR (f)
	$	$	$	$	$
I. Land:					
(201) Land	—	9,610	62,309	5,036,490	4,983,791
II. Buildings:					
(202) Buildings and appurtenances on land owned	—	423,404	100,040	6,524,310	6,847,674
(203) Buildings and appurtenances on land not owned	—	952,677	23,315	5,405,710	6,335,072
(204) Improvements to buildings not owned	—	120,654	7,765	183,141	296,030
Total buildings	—	1,496,735	131,120	12,113,161	13,478,776
III. Equipment:					
(205) Cars	9,981,121†	—	131,145	8,026,785	17,876,761
(206) Horses	—	—	—	—	—
(207) Automobiles	9,617,694‡	153,558	3,800,160	26,595,606	32,566,698
(208) Wagons and sleighs	—	—	—	—	—
(209) Harness equipment	—	—	—	—	—
(210) Office furniture and equipment	—	327,362	77,316	4,423,504	4,673,550
(211) Office safes	—	47	9,802	377,884	368,129
(212) Trucks	—	11,516	55,345	3,340,304	3,296,475
(213) Stable equipment	—	—	—	—	—
(214) Garage equipment	—	21,565	94,538	420,858	347,885
(215) Line equipment	—	47*	6,913	101,130	94,170
(216) Shop equipment	—	5,257	25,233	397,554	377,578
(217) Miscellaneous equipment	—	30,375	—	19,836	50,211
(218) Minor equipment	—	—	—	2,585,763	2,585,763
Total equipment	19,598,815	549,633	4,200,452	46,289,224	62,237,220
Total real property and equipment	19,598,815	2,055,978	4,393,881	63,438,875	80,699,787

* Denotes Credit.
† Equipment Obligations—Refrigerator Cars purchased under Conditional Sales Agreement.
‡ Equipment Obligations—Automotive Equipment purchased under Conditional Sales Agreement.

[fol. 109]

(Exhibit page 27-A)

ANNUAL REPORT — 1955

DEPRECIATION RESERVE — BUILDINGS AND EQUIPMENT

Give particulars of the credits and debits made to account No. 548, "Accrued depreciation—Buildings and equipment" during the year. If any entries are made in columns (*d*), (*e*), and (*i*), state the facts occasioning such entries. The totals in columns (*b*) and (*k*), line 21, should agree with the amounts shown in the General Balance Sheet for account No. 548, or an appropriate explanation of the difference should be made.

ACCOUNT (a)	BALANCE AT BEGINNING OF YEAR (b)	CREDITS TO RESERVE DURING THE YEAR: CHARGES TO OPERATING EXPENSES: CURRENT ACCRUALS (c)	PRIOR YEAR ADJUSTMENTS (d)	OTHER CREDITS (e)	TOTAL CREDITS (f)
	$	$	$	$	$
II. Buildings:					
(202) Buildings and appurtenances on land owned	3,383,352	141,840	—	—	141,840
(203) Buildings and appurtenances on land not owned	2,921,760	131,296	—	—	131,296
(204) Improvements to buildings not owned	19,381	57,550	—	—	57,550
Total buildings	6,324,493	330,686	—	—	330,686
III. Equipment:					
(205) Cars	2,027,798	585,163	—	—	585,163
(206) Horses	—	—	—	—	—
(207) Automobiles	20,666,719	2,112,615	—	—	2,112,615
(208) Wagons and sleighs	—	—	—	—	—
(209) Harness equipment	—	—	—	—	—
(210) Office furniture and equipment	1,377,335	215,086	—	—	215,086
(211) Office safes	320,384	2,384	—	—	2,384
(212) Trucks	2,255,272	59,779	—	—	59,779
(213) Stable equipment	—	—	—	—	—
(214) Garage equipment	316,603	15,352	—	—	15,352
(215) Line equipment	93,338	538	—	—	538
(216) Shop equipment	182,454	16,305	—	—	16,305
(217) Miscellaneous equipment	13,865	4,408	—	—	4,408
(218) Minor equipment	1,831,337	—	—	—	—
Total equipment	29,085,105	3,011,630	—	—	3,011,630
Total real property and equipment	35,409,598	3,342,316	—	—	3,342,316

[fol. 110]

ACCOUNT
(g)

II. Buildings:
(202) Buildings and appurtenances on land owned .....
(203) Buildings and appurtenances on land not owned .....
(204) Improvements to buildings not owned .....

Total buildings .....

III. Equipment:
(205) Cars .....
(206) Horses .....
(207) Automobiles .....
(208) Wagons and sleighs .....
(209) Harness and equipment .....
(210) Office furniture and equipment .....
(211) Office safes .....
(212) Trucks .....
(213) Stable equipment .....
(214) Garage equipment .....
(215) Line equipment .....
(216) Shop equipment .....
(217) Miscellaneous equipment .....
(218) Minor equipment .....

Total equipment .....

Total real property and equipment .....

Debits to Reserve During the Year			Balance at Close of Year
Charges for Retirements (h)	Other Debits (i)	Total Debits (j)	(k)
$	$	$	$
80,820	—	80,820	3,444,372
15,976	—	15,976	3,037,080
7,765	—	7,765	69,166
104,561	—	104,561	6,550,618
131,146	—	131,146	2,481,815
—	—	—	—
3,800,160	—	3,800,160	18,979,174
—	—	—	—
—	—	—	—
77,314	—	77,314	1,515,107
9,802	—	9,802	312,966
55,344	—	55,344	2,259,707
—	—	—	—
94,539	—	94,539	237,416
6,913	—	6,913	86,963
25,232	—	25,232	173,527
—	—	—	18,273
—	—	—	1,831,337
4,200,450	—	4,200,450	27,896,285
4,305,011	—	4,305,011	34,446,903

[fol. 111]

~~(EXHIBIT PAGE 54)~~

COMPARATIVE GENERAL BALANCE SHEET — ASSET SIDE

BALANCE AT BEGINNING OF YEAR (a)	ITEM (b)	(b-1) TOTAL BOOK ASSETS AT CLOSE OF YEAR	(b-2) RESPONDENT'S OWN ISSUES INCLUDED IN (b-1)	BALANCE AT CLOSE OF YEAR (c)	NET CHANGE DURING YEAR (INCREASE IN BLACK, DECREASE IN RED) (d)
$	INVESTMENT			$	$
63,438,875	(501) Real property and equipment (p. 27)	$80,699,787	None	80,699,787	17,260,912
None	(502) Sinking funds (p. 45)	None	None	None	—
57,136	(503) Miscellaneous physical property (p. 25)			52,405	4,731*
	(504) Investments in affiliated companies—				
28,500	(A) Stocks (pp. 36 and 41)			28,500	—
None	(B) Bonds (pp. 38 and 42)			None	—
None	(C) Notes			None	—
None	(D) Advances			None	—
	(505) Other investments—				
None	(A) Stocks (pp. 37 and 41)			None	—
1,308,471	(B) Bonds (pp. 39 and 42)			1,242,623	65,848*
None	(C) Notes			None	—
None	(D) Advances			None	—
64,832,982	Total investment			82,023,315	17,190,333
	CURRENT ASSETS				
27,957,106	(506) Cash			34,610,796	6,653,690
1,756	(507) Special deposits			1,707	49*
2,457	(508) Loans and notes receivable			3,464	1,007
None	(509) Traffic balances receivable			None	—
12,606,794	(510) Net balances receivable from agents and messengers			14,469,867	1,863,073
2,825,205	(511) Miscellaneous accounts receivable			3,093,277	268,072
754,246	(512) Material and supplies			709,560	44,686*
2,044	(513) Interest, dividends, and rents receivable			1,499	545*
9,780	(514) Working fund advances			1,175	8,605*
906,520	(515) Other current assets			1,030,370	123,850
45,065,908	Total current assets			53,921,715	8,855,807
	DEFERRED ASSETS	(b-1) TOTAL BOOK ASSETS AT CLOSE OF YEAR	(b-2) RESPONDENT'S OWN ISSUES INCLUDED IN (b-1)		
76,793	(516) Insurance and other reserve funds (p. 45)	$76,718	None	76,718	75*
None	(517) Provident funds (p. 45)	None	None	None	—
None	(518) Fidelity and indemnity funds (p. 45)	None	None	None	—
None	(519) Advance payments on contracts			None	—
17,183	(520) Other deferred assets			23,088	5,905
93,976	Total deferred assets			99,806	5,830
	UNADJUSTED DEBITS				
225,478	(521) Rents and insurance premiums paid in advance			278,273	52,795
427,378	(522) Taxes paid in advance			435,677	8,299
None	(523) Discount on capital stock			None	—
None	(524) Discount on funded debt			None	—
3,480,447	(525) Other unadjusted debits			1,863,073	1,617,374*
			PAR VALUE OF HOLDING AT CLOSE OF YEAR		
	(526) Securities issued or assumed—Unpledged (pp. 19 and 23)		None		
	(527) Securities issued or assumed—Pledged (pp. 19 and 23)		None		
4,133,303	Total unadjusted debits			2,577,023	1,556,280*
114,126,169	GRAND TOTAL			138,621,859	24,495,690

*Denotes Decrease.

[fol. 112]

COMPARATIVE BALANCE SHEET — LIABILITY SIDE

BALANCE AT BEGINNING OF YEAR (a)	ITEM (b)	(b-1) TOTAL BOOK LIABILITY AT CLOSE OF YEAR	(b-2) PORTION HELD BY OR FOR RESPONDENT AT CLOSE OF YEAR	BALANCE AT CLOSE OF YEAR (c)	NET CHANGE DURING YEAR (INCREASE IN BLACK, DECREASE IN RED) (d)
$				$	$
	STOCK				
100,000	(528) Capital stock (p. 19)	$ 99,900	None	99,900	100*
None	(529) Premium on capital stock	None	None	None	—
100,000	Total stock liabilities	99,900	None	99,900	100*
	LONG-TERM DEBT	(b-1) TOTAL BOOK LIABILITY AT CLOSE OF YEAR	(b-2) PORTION HELD BY OR FOR RESPONDENT AT CLOSE OF YEAR		
28,608,570	(530) Funded debt unmatured (p. 23)	$28,591,266	None	28,591,266	17,304*
None	(530½) Equipment Obligations—Automotive Equipment	8,816,219	None	8,816,219	8,816,219
None	Equipment Obligations—Refrigerator Cars	9,981,121	None	9,981,121	9,981,121
28,608,570	Total Long-Term Debt	$47,388,606	None	47,388,606	18,780,036
	CURRENT LIABILITIES				
None	(531) Loans and notes payable			None	—
8,643	(532) Traffic balances payable			21,455	12,812
12,208,463	(533) Audited accounts and wages unpaid			13,525,582	1,317,119
7,146,375	(534) Miscellaneous accounts payable			6,815,544	330,831*
None	(535) Matured interest, dividends, and rents unpaid			None	—
None	(536) Matured funded debt unpaid			None	—
1,950	(537) Miscellaneous advances payable			1,600	350*
2,202,085	(538) Unpaid money orders, checks, and drafts			2,296,948	94,863
18,861,589	(539) Express privilege liabilities			21,396,104	2,534,515
1,885,883	(540) Estimated tax liability			1,787,052	98,831*
119,202	(541) Unmatured interest, dividends, and rents payable			95,304	23,898*
1,184,958	(542) Other current liabilities			2,457,307	1,272,349
43,619,148	Total current liabilities			48,396,896	4,777,748
	DEFERRED LIABILITIES				
None	(543) Liability on account of provident funds			None	—
None	(544) Liability on account of fidelity and indemnity funds			None	—
None	(545) Other deferred liabilities			690	690
None	Total deferred liabilities			690	690
	UNADJUSTED CREDITS				
None	(546) Premium on funded debt			None	—
6,231,024	(547) Operating and insurance reserves			8,171,082	1,940,058
35,405,439	(548) Accrued depreciation—Buildings and equipment (p. 27A)			34,442,332	963,107*
13,212	(550) Accrued depreciation—Miscellaneous physical property			8,043	5,169*
148,776	(551) Other unadjusted credits			114,310	34,466*
41,798,451	Total unadjusted credits			42,735,767	937,316
	CORPORATE SURPLUS				
None	(552) Additions to property through income and surplus			None	—
None	(553) Reserves from income and surplus			None	—
None	Total appropriated surplus			None	—
None	(554) Profit and loss balance (p. 30)			None	—
None	Total corporate surplus			None	—
114,126,169	GRAND TOTAL			138,621,859	24,495,690

*Denotes Decrease.

[fol. 113] THIS AGREEMENT entered into the 7th day of March, 1932, by and between RAILWAY EXPRESS AGENCY, INCORPORATED, a Delaware corporation, hereinafter referred to as the Delaware Company, and RAILWAY EXPRESS AGENCY, INCORPORATED, OF VIRGINIA, a Virginia corporation, hereinafter referred to as the Virginia Company:

WITNESSETH:

WHEREAS, the Delaware Company conducts an express transportation business throughout the United States and between the several States of the United States, including the Commonwealth of Virginia and other States, and

WHEREAS, the Virginia Company is about to begin the transaction of an express business within the Commonwealth of Virginia, and

WHEREAS, the Delaware Company has contracts with railroad companies and other carriers constituting and appointing it their exclusive agent for the conduct and transaction of the express transportation business over the several lines of such railroads and other carriers, including railroads and carriers operating in and through the Commonwealth of Virginia, and

WHEREAS, the Delaware Company desires that the Virginia Company transact the intrastate express business in Virginia on the lines of such railroads and other carriers with which the Delaware Company has contracts and the Virginia Company is willing to transact such business, and

WHEREAS, the Virginia Company desires to contract with the Delaware Company for the use of the Delaware [fol. 114] Company's real property and equipment in connection with the transaction of the business of the Virginia Company, and

WHEREAS, the parties hereto for purposes of mutual convenience and economy, and of more efficient service to the public, are desirous of establishing and maintaining joint forces, offices and facilities, for the transaction of the express business in Virginia.

Now, THEREFORE, it is agreed between the parties hereto as follows:

I

The Virginia Company shall conduct the intrastate express transportation business in the Commonwealth of Virginia on the lines of the carriers named on the list hereto attached marked "Exhibit A" and hereby made a part hereof, and/or on such other lines as the Delaware Company may designate from time to time, and, except as herein otherwise provided, the Virginia Company shall perform all of the obligations of the Delaware Company imposed by contracts between the latter Company and such carriers concerning intrastate operations in Virginia.

II

The Delaware Company shall furnish the Virginia Company from time to time, or permit the use jointly with it by the Virginia Company of, such property, real and personal, as may be necessary in the conduct of the business transacted by the Virginia Company.

III

Whenever necessary for the conduct of the business of the parties hereto transacted in or in connection with the Commonwealth of Virginia employes of the parties hereto shall be joint employes.

[fol. 115]

IV

All revenues received by agents of the Virginia Company shall be transmitted to the Delaware Company or such of its representatives as it may designate from time to time.

V

The Delaware Company shall initially pay or bear all costs or expenses, including all operating expenses, taxes, (except taxes levied solely against the Virginia Company), uncollectible revenue from transportation, profit and loss

debits and similar charges. All costs or expenses incurred for the joint benefit of both parties hereto shall be apportioned between such parties on such bases as shall be agreed to by the parties. Any expenses for the exclusive benefit of either company shall be charged wholly to that company.

The revenues on intrastate business in Virginia shall accrue to the Virginia Company as shall also any other revenues which shall be earned by it or which it shall be mutually agreed shall be included in its revenue accounts. The Virginia Company shall assume all operating expenses and taxes incident to earning its revenues. Any excess of revenues over expenses, taxes, and other costs, of or chargeable to the Virginia Company as provided herein, shall be credited to the Delaware Company, in consideration of which the Delaware Company shall protect and save harmless the Virginia Company from any further payments for the transportation of the express matter of the Virginia Company over the railroad and other transportation lines in Virginia and for the use by the Virginia Company of the real property and equipment of the Delaware Company as herein provided for.

[fol. 116]

VI

The Delaware Company shall report monthly to the Virginia Company the Virginia Company's revenues and the Virginia Company's proportion of joint expenses, also the Virginia Company's exclusive costs and charges arising from the operations under this agreement. A monthly accounting shall be made between the two companies.

VII

This agreement shall become effective as of the 12th day of March, 1932, and shall continue in effect until cancelled by mutual consent of the parties hereto or by thirty days written notice by either party to the other of its desire to terminate the same.

IN WITNESS WHEREOF the parties hereto by their officers thereunto duly authorized have executed this agreement in duplicate as of the day and year first above written.

RAILWAY EXPRESS AGENCY, INCORPORATED

By (s) Robt. E. M. Cowie
President

(SEAL)

Attest:

(s) E. R. Merry, Jr.
Secretary

RAILWAY EXPRESS AGENCY, INCORPORATED,
OF VIRGINIA

By (s) W. A. Benson
Executive Vice President

(SEAL)

Attest:

(s) E. R. Merry, Jr.
Secretary

[fol. 117] EXHIBIT A

List of Carriers Operating in the Commonwealth of Virginia with which the Railway Express Agency, Inc. has Agreements for the Transportation of Express shipments

March 7, 1932

STEAM LINES:

Atlantic Coast Line Railroad Company
Baltimore and Ohio Railroad Company
*Chesapeake and Ohio Railway Company
Chesapeake Western Railway
Clinchfield Railroad Company
Louisville and Nashville Railroad Company
Nelson and Albemarle Railway Company
Norfolk and Western Railway Company
Norfolk Southern Railroad Company
*Pennsylvania Railroad Company
Richmond, Fredericksburg and Potomac Railroad Company
Seaboard Air Line Railway Company
Virginia Central Railway
Virginian Railway Company
Winchester and Wardensville Railroad Company

*Includes Boat Lines.

ELECTRIC LINES:

Washington and Old Dominion Railway

BOAT LINES:

Baltimore Steam Packet Company

[fol. 118] THIS SUPPLEMENTAL AGREEMENT entered into as of the 22nd day of January 1942 by and between RAILWAY EXPRESS AGENCY, INCORPORATED, a Delaware corporation hereinafter referred to as the "Delaware Company", and RAILWAY EXPRESS AGENCY, INCORPORATED, OF VIRGINIA, a Virginia corporation hereinafter referred to as the "Virginia Company";

WITNESSETH:

WHEREAS, the parties hereto entered into an Agreement on March 7, 1932, with respect to the establishing and maintaining of joint forces, offices and facilities for the transaction of express business in Virginia, and

WHEREAS, the parties hereto now desire to supplement said Agreement of March 7, 1932, for the purpose of providing specifically for the carrying on of express business within the Commonwealth of Virginia by means of motor vehicles.

NOW THEREFORE the parties hereto further agree as follows:

A. The Virginia Company shall, in addition to the business specifically described in said Agreement of March 7, 1932, conduct an intrastate express transportation business in the Commonwealth of Virginia by means of motor vehicles upon such routes, on such schedules and subject to such rules and regulations as may be authorized or prescribed from time to time by the State Corporation Commission of Virginia, and such other regulatory body or bodies as may have jurisdiction thereof. All of the terms and provisions of said agreement of March 7, 1932, in so far as they may be applicable to said intrastate express business by motor vehicles, shall apply and pertain [fol. 119] to the conducting of said business by the Virginia Company.

B. Whenever the Virginia Company shall have been authorized by the State Corporation Commission of Virginia to conduct an intrastate express business by motor vehicles upon any particular route and/or schedule, the

Delaware Company hereby agrees that its obligations under said Agreement of March 7, 1932, in so far as said obligations relate to the conducting of express service upon said route or schedule, shall not be cancelled or terminated but shall remain in full force and effect until such time as the Virginia Company shall, in the manner permitted or prescribed by law, have discontinued or abandoned its express service upon said route or schedule.

C. The Agreement of March 7, 1932, as hereby supplemented, shall continue in full force and effect.

IN WITNESS WHEREOF the parties hereto by their officers thereunto duly authorized have executed this Agreement in duplicate as of the day and year first above written.

RAILWAY EXPRESS AGENCY, INCORPORATED

By (s) L. O. Head
President

Attest:

(s) E. R. Merry, Jr.
Secretary

(SEAL)

RAILWAY EXPRESS AGENCY, INCORPORATED,
OF VIRGINIA

By (s) S. F. Pitcher
Executive Assistant

Attest:

(s) E. R. Merry, Jr.
Secretary

(SEAL)

[fol. 120]

EXCERPTS FROM EXHIBIT 10

ANNUAL REPORT

OF

EXPRESS COMPANIES

REPORT OF

RAILWAY EXPRESS AGENCY, INCORPORATED

TO THE

STATE CORPORATION COMMISSION VIRGINIA

FOR THE YEAR 1956

[fol. 121]

THE COMMISSION'S FORMULA

RAILWAY EXPRESS AGENCY, INCORPORATED

COMPUTATION OF GROSS RECEIPTS—1955

Gross Receipts earned in Virginia over lines other than railroads

AIRLINES	(A) GROSS REVENUE	(B) PERCENTAGE OF MILEAGE IN VA.	(C) VIRGINIA REVENUE COL. A X B
American	$ 8,786,335	5.83	$ 512,243
Capital	2,389,677	5.85	139,796
Eastern	4,426,667	5.85	258,960
National	602,628	10.78	64,963
Piedmont	108,400	22.40	24,281
	$16,313,707		$1,000,243

Gross Receipts earned in Virginia over railroads

Total Gross Receipts 1955	$387,854,479
Deduct Gross Receipts on Lines operated by carriers other than railroads:	
Payments to carriers other than RR—$22,473,281	
Ratio Gross Receipts on Lines other than railroads to payments to lines other than railroads—1.934 (See Note 1)	
$22,473,281 x 1.94	43,463,325
Total Gross Receipts from operations by rail	$344,391,154
Total Amount paid to railroads for express privileges	121,951,105
Ratio of Gross Receipts to amount paid to railroads	2.824

RAILROADS	(A) PAYMENTS TO RAILROADS	(B) PERCENTAGE OF MILEAGE IN VIRGINIA	(C) COLUMN A X B	(D) VIRGINIA REVENUE COL. C X 2.824
A. C. L.	$ 3,180,565	2.22	$ 70,609	$ 199,400
C. & O.	994,705	23.30	231,766	654,507
N. & W.	727,195	60.29	438,426	1,238,115
R. F. & P.	1,073,639	96.97	1,041,108	2,940,089
S. A. L.	2,244,247	4.25	95,380	269,353
Sou.	3,246,768	8.84	287,014	810,528
	$11,467,119		$2,164,303	$6,111,992

[fol. 122]

Virginia portion of Gross Receipts

Railroads	$6,111,992
Airlines	1,000,243
Total	$7,112,235
Less amount reported by Virginia Corporation	612,716
Gross Receipts to be taxed	$6,499,519
Tax @ 2.15%	$ 139,739.66

NOTE 1. For the five major air lines which do business in Virginia the amount of payments by the express company was $8,436,605.82. The total gross revenue of these same five lines was $16,313,707. This gives us a ratio of gross receipts to express company payments of 1.934.

Since the air lines haul the vast majority of all express that is hauled by carriers other than railroads, and since our five airlines received 37½% of all payments to carriers other than railroads, the above ratio of 1.934 should be used.

[fol. 123]

REPORT OF

RAILWAY EXPRESS AGENCY, INCORPORATED

AN EXPRESS COMPANY OPERATING IN THE STATE OF VIRGINIA

Charter granted under the laws of the State of Delaware

Month: December Day: 7 Year: 1928

Location of principal office or place of business: Executive Headquarters No. 219 East 42nd Street, New York, N. Y.

Name, title and address of officer making this report:

* * *

GROSS RECEIPTS FROM BUSINESS TRANSACTED IN VIRGINIA FOR THE YEAR ENDING DEC. 31ST, 1955

RECEIPTS	AMOUNT
All Receipts from business beginning and ending within this State	$
All Receipts earned in Virginia on business passing through, into or out of this State	$ None
Gross Receipts, Entire Line from the business of this Company for the year ending December 31st, 1955	$387,241,764.18

[fol. 124]

[fol. 124]

(Extend page 30)

LOCATION OF PROPERTY			LAND AND BUILDINGS						OFFICE FURNITURE AND EQUIPMENT		
				Land				Buildings			
City, County or Town	School District	Name of each express office	Description	Number of acres or square feet. Denote sq. ft. by "F"	Cost	Market value	Value assessed by the State Corporation Commission	Cost	Cost	Market value	Value assessed by the State Corporation Commission
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(12)	(13)	(14)
Cities and Towns Total								108,973.59	82,095.35	41,042.58	
County Total								360.47	3,693.52	1,842.25	
Total for State (Counties-Cities-Towns)								109,334.06	85,788.87	42,884.83	

AUTOMOTIVE EQUIPMENT					TRUCKS				ALL OTHER TANGIBLE PE		TOTAL VALUE REAL AND TANGIBLE PERSONAL PROPERTY		
Number and trade name	Year purchased	Cost	Market value	Value assessed by the State Corporation Commission	Kind	Cost	Market value	Value assessed by the State Corporation Commission	Description	Cost	To be filled in by the reporting company	Assessed by the State Corporation Commission: Whole dollars	Whole dollars
(15)	(16)	(17)	(18)	(19)	(20)	(21)	(22)	(23)	(24)	(25)	(28)	(29)	(30)
		510,300.43	239,465.24			39,957.03	19,969.46						
						6,569.83	3,284.93						
		510,300.43	239,465.24			46,526.86	23,254.39						

TRUCKS			ALL OTHER TANGIBLE PERSONAL PROPERTY			
Cost	Market value	Value assessed by the State Corporation Commission	Description	Cost	Market value	Value assessed by the State Corporation Commission
(21)	(22)	(23)	(24)	(25)	(26)	(27)
39,957.03	19,969.46					
6,569.83	3,284.93					
46,526.86	23,254.39					

MATTHEW BENDER & COMPANY

MB

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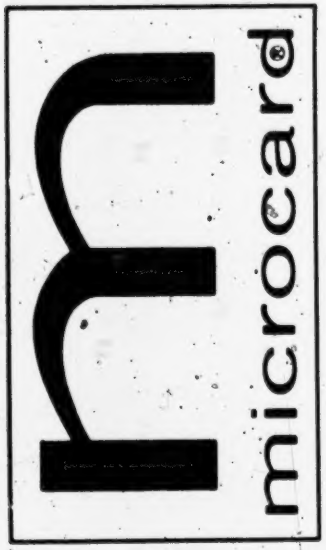
8

8

2

MICROCARD

TRADE MARK ®



[fol. 125]

Money

Money on deposit with any bank, or other corporation, or firm, or person, or in the possession, or under the control of the owner, including certificates of deposit with any bank, banking association, trust or security company in this State	$118,868.96
Cash in hands of Agents	1,241.74
Money on deposit with any bank, or other corporation, or firm, or person, or in the possession, or under the control of the owner, including certificates of deposit with any bank, banking association, trust or security company, out of this State	$ _____
Total money on deposit as of December 31, 1955	
In this state	$120,110.70

[fol. 126]

EXTRACT FROM EXHIBIT No. 13

RAILWAY EXPRESS AGENCY, INCORPORATED

Virginia State Tax That Could Have Been Assessed on
Company-Owned Express Refrigerator Cars for Years 1951 to 1956, Inclusive,
Calculated on Formula Used by State Corporation Commission in Fixing Its Last Assessment for 1950

TAX YEAR	VIRGINIA CAR MILES TRAVELLED PRIOR YEAR		VALUE ASSESSABLE PER 1000 CAR MILES		TOTAL ASSESSABLE VALUE		TAX RATE PER $100 OF VALUE		STATE AD VALOREM TAX ASSESSABLE
1951	538,535	×	$32.8776	=	$17,705.74	×	$2.50	=	$442.64
1952	404.921	×	32.8776	=	13,312.83	×	2.50	=	332.82
1953	301.352	×	32.8776	=	9,907.73	×	2.50	=	247.69
1954	260,513	×	32.8776	=	8,565.04	×	2.50	=	214.13
1955	297,667	×	32.8776	=	9,786.58	×	2.50	=	244.66
1956	520,188	×	32.8776	=	17,102.53	×	2.50	=	427.56